THE INDIAN LAW REPORTS,

BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

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Chief Justice.

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HON. MR. N. G. CHANDAVARKAR (*Acting from 14th June to 9th July*).

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THE

INDIAN LAW REPORTS,

Bombay Series.

PRIVY COUNCIL*.

BANK OF BOMBAY AND OTHERS (DEFENDANTS) *v.* SULEMAN SOMJI AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).

1903.
May 13, 14.
July 31.

[On appeal from the High Court of Judicature at Bombay.]

Mortgagor and Mortgagee—Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title-deeds previously with mortgagees—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.

A Hindu carrying on business in Bombay died in 1885 having executed a will by which he left to his four elder sons certain immoveable property subject to a charge of Rs. 30,000 in favour of his widow and four younger sons, and made his four elder sons executors and residuary legatees of his will, directing them to carry on the business. After their father's death the elder sons in the course of their business transactions became indebted to the Bank of Bombay in respect of advances by the Bank, to secure which on 13th September 1890 (two of the younger sons being then minors), the elder sons deposited with the Bank by way of equitable mortgage certain title-deeds relating to the property charged by the will; and on 12th January 1899 executed a mortgage of the same property in favour of the Bank for Rs. 52,000 without stating the charge upon it. In one of the documents of title deposited with the Bank the title of the mortgagors was indicated, and had the Bank investigated the title (which they did not do) they would have been put upon inquiry and would

* *Present* :—LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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have become aware of the charge created on the property by the will. The younger sons only became aware of the transaction in June 1903 when the Bank advertised the property for sale under their mortgage. In a suit brought by them on 15th September 1903 against the Bank and the mortgagors to establish the priority of their charge over the mortgage to the Bank, the latter pleaded that the mortgage was made for valuable consideration, and that they were *bond fide* transferees without notice.

Held (upholding the decision of the High Court) that under the circumstances the Bank had constructive notice of the charge under the will. The Bank had on the facts dealt with the mortgagors not as executors but as persons pledging their own property for their own debts, and under the circumstances took no better title than that which their debtors really had in the capacity in which they were dealt with, namely, residuary legatees.

In re Queale's Estate (1) followed.

Held also that, the plaintiffs being legatees the Bank took the property subject to the charge upon it created by the will. Distinction drawn between creditors and legatees in such a case: Spence's "Equitable Jurisdiction," Vol. II, page 376, referred to.

By the terms of the will the legacy was to be made up and paid within six years after the testator's death which period expired in 1891, and the mortgage was not executed until eight years afterwards; and it was contended that assuming that the Bank had notice of the will they were entitled to assume that the executors were acting with the consent of the legatees (plaintiffs).

Held that, although in cases of this kind delay was a circumstance to be taken into consideration, yet, having regard to the fact that two of the plaintiffs were still minors when the title-deeds were deposited with the Bank, and that continued possession by the executors and mortgagors was not inconsistent with the purposes of the will, the rights of the parties were unaffected by that circumstance.

APPEAL from a decree (14th April 1905) of the High Court at Bombay in its appellate jurisdiction which reversed or varied a decree (23rd August 1904) passed by a Judge of the said Court sitting in exercise of its Original Civil Jurisdiction.

The main question for decision on this appeal was whether a mortgage, dated 12th January 1899 in favour of the appellants, the Bank of Bombay, had priority over the claims of certain pecuniary legatees under the will of one Somji Parpia deceased.

The testator was a Khoja Mahomedan, inhabitant of Bombay, who traded as a furniture dealer and died on 15th February

(1) (1880) Ir. L. R. 17 Ch. D. 261 at page 268.

1885. He had a brother Dhanji, and both the brothers jointly purchased a house in Bhájipala Street, one of the properties now in dispute. Dhanji died childless in 1867 leaving his widow, Meenabai, as his heir.

At Somji Papia's death he left him surviving his widow Labai and eight sons, of whom four were sons of a former wife, namely, Rahimtoola Somji Parpia, the respondent Jaffer Somji, Goolam Hussein Somji, and the respondent Alladin Somji. The four younger sons were the respondents, Suleman Somji, Goolam Ali Somji aged 4, Mahomed Somji, and Habib Somji (who were twins) aged 2.

The will of Somji Parpia was dated 13th February 1885, and by it, after enumerating the items of property belonging to him (which included the moiety of the house in Bhájipala Street, and the entirety of some land in Falkland Road on which the Elphinstone Theatre was erected, and which then stood in the name of his son Goolam Hussein Somji) and defining his heirs made the following (among other) provisions.

"*Clause 3.*—I bequeath all my abovementioned property, such as all the goods in the two shops, outstanding debts, claims and debts and the abovementioned moiety of the house, situated in Bhajipala Street and the theatre, &c. (*i. e.*), the whole of the (said) property and goods to the sons of my former deceased wife (namely), Rahimtulla, Jaffer, Gulam Hussein and Alladin (4 persons). None of (my) other heirs has any claim or title thereto. But as to the moiety of the abovementioned house belonging to me I exclude the right thereto of my elder son Rahimtulla and I reserve the right of my three sons only, namely, Jaffer, Gulam Hussein, and Alladin, these three persons to (my) said moiety of the house. To the remaining property the abovementioned four persons are entitled in equal (shares).

"*Clause 4.*—For (my) remaining heirs I order my abovementioned sons (four persons), whose names are Rahimtulla, Jaffar, Gulam Hussein, and Alladin, that they shall duly give and act in accordance with what is written below:—

"*Clause 5.*—To my present surviving wife Labai and to her sons named Suleman, Gulam Ali, Mahomed and Habib my said elder sons, four persons to whom I entrust all my goods and property, shall within 6 years, namely six years after my decease, duly make up and pay Rs. 30,000, namely thirty thousand, to my surviving wife and to her sons. The same shall be paid (to them) in the following manner. No interest on the said (sum of) money shall be paid up to the abovementioned period, and upto that period there shall duly be paid Rs. 125, namely one hundred and twenty-five every month, for

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house-hold expenses and before the abovementioned sum of Rs. 30,000, namely thirty thousand, is fully made up if the betrothal (or marriage, &c.) of any son or daughter should take place, then as to the proper (sum of) money that may be required for the expenses thereof the same shall truly be paid out of the (abovementioned) sum, and when the abovementioned sum of Rupees thirty thousand shall have been fully made up (and paid) then from that day the aforesaid (sum) of Rupees one hundred and twenty-five, being the amount of the instalment payable every month for the expenses shall duly cease, that is to say, the same shall not be paid thereafter. Besides this my second surviving wife and her children shall have no manner of right or claim against the four persons (namely my) sons by my first deceased wife, or against my said goods and property in any way whatever.

"*Clause 6.*—As to the (sum of) Rupees thirty thousand directed to be paid out of my abovementioned goods and property as a share of inheritance by my abovementioned elder sons (four persons) to my surviving wife and her sons mentioned in the 5th Clause, I appoint four persons as trustees in respect of the said (sum of) money. Their names are Jaffer Somji, Gulam Hussein Somji, Jaffer Ladhabhai Chatu and my second surviving wife. I appoint these four persons (as trustees) and I direct them as follows:—The said (sum of) money shall truly be appropriated in accordance with what is written below. Out of the abovementioned sum of Rupees thirty thousand which my elder sons shall pay to my surviving wife and her sons as a share of inheritance the outlays on auspicious and inauspicious occasions, whatever the same may come to—having been deducted, as to whatever sum may remain over, a good estate or a house shall be purchased therewith and given (to them). The same shall be purchased in the names of my surviving wife and her sons and given to them; or (the money) shall be deposited at interest at a good place, and out of the income that may be realized therefrom, (moneys) shall be paid to my surviving wife during her lifetime for her and her children's lodging food and clothes and other expenses. And after the decease of my surviving wife when her youngest son shall come of age whatever property there may be (left out) of the said (sum of) Rs. 30,000 the same shall truly be divided and given in equal shares to her children.

"*Clause 9.*—I recommend my four elder sons mentioned in the 4th Clause as follows:—If my second surviving wife and her sons should live in peace and harmony with them (my sons) shall allow them to live in the moiety belonging to me of the said house situated in the Bhajipala Street.

"*Clause 10*—I recommend my said four elder sons, to whom I bequeath all my goods and property, shop, &c., as follows:—After my life-time they shall continue to carry on trade and business in my name and having come to an understanding between themselves and apportioned their respective shares they shall make a writing in respect thereof and shall carry on trade and business in accordance with their own free will and pleasure.

"*Clause 12.*—I nominate or (and) appoint my said four sons named Rahimtulla, Jaffer, Gulam Hussein and Alladin executors of (this) my said will."

Meenabai, the widow of Dhanji, died in 1889 leaving a will dated 18th December 1880 by which after reciting that the house in Bhajipala Street had belonged to Somji Parpia and her husband in equal shares, she bequeathed the half-share which came to her from her husband to Rahimtulla Somji Parpia whom she described in the will as her and her husband's adopted son.

After the death of Somji Parpia the four elder sons and the widow Labai (until her death in 1894) and the four younger sons all lived amicably in the house in Bhajipala Street; and the four elder sons took over the whole of the property and carried on business as Somji Parpia and Company, the Bank of Bombay acting as their bankers; and in the course of their business they became largely indebted to the Bank, and eventually on 12th January 1899 executed in favour of the Bank the mortgage now in suit for Rs. 52,000, as security for which they deposited with the Bank certain documents relating to the house in Bhajipala Street, namely a copy of the will of Meenabai, and a conveyance dated 12th March 1861, by one Khan Mahomed Habibhoy and Karim Khatav to Dhanji Parpia; and others relating to the Elphinstone Theatre in Falkland Road, namely, a copy of lease, dated 14th October 1892, by one Sha Mulchand Nensey to Gulam Hussein Somji Parpia; a conveyance dated 26th August 1882 by one Peerbhoy Nathu to Gulam Hussein Somji; and an Indenture dated August 22nd 1884 between one Javerbai and Gulam Hussein Somji. The mortgage included the house in Bhajipala Street and the land in Falkland Road with the theatre erected thereon which are in dispute on this appeal.

In June 1903 the Bank of Bombay, in exercise of the power contained in their mortgage, advertised the sale by public auction of the properties comprised in it, whereupon the four younger sons of Somji Parpia gave notice in writing to the Bank that under the will of their father they claimed a charge on the properties in suit to the extent of Rs. 30,000 and that if the properties were sold they should be sold subject to the charge. The Bank postponed the sale after having intimated in writing that the sale was to be of the right, title and interest of the mortgagors.

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The four younger sons then, on 15th September 1903, filed the suit out of which the present appeal arose, against the four elder sons and the Bank claiming a charge on the properties in suit in priority to that of the Bank for the balance they stated to be due to them in respect of the legacy of Rs. 30,000. They alleged that the mortgage was executed in fraud of their rights and in breach of the trust imposed on the first four defendants by the will of Somji Parpia; and that the Bank took the mortgage with actual or constructive notice of the charge; and they asked for a decree for the due administration of the properties of the deceased Somji Parpia which they alleged became vested in the first four defendants as his executors and heirs, subject to the charge.

On 14th January 1904 before the suit came on for hearing the Bank of Bombay transferred their mortgage to one Dwarkadas Dharamsey who was added as a defendant to the suit.

The defendant Rahimtulla did not defend the suit. The defences made by the other defendants appear from the issues which were as follows:—(1) What was the property or properties conveyed by the mortgage of 12th January 1899? (2) Whether the plaintiffs have a charge on the property, the subject of the said mortgage? (3) Whether the Bank of Bombay were not *bonâ fide* transferees for value of the property mentioned in the said mortgage? (4) Whether the Bank of Bombay had notice of the charge, if any, in favour of the plaintiffs? (5) Whether the plaintiffs are entitled to the relief claimed or any part thereof? (6) Whether in any event plaintiffs have any claim to one moiety of the Bhajipala Street property subject to the said mortgage?

On these issues the first Court (CHANDAVARKAR, J.) held that on the construction of Somji Parpia's will the plaintiffs had a charge on the properties conveyed by the mortgage; that the Bank had no actual notice of the charge made by the will; but that they had constructive notice of it from the recitals in Meenabai's will which was one of the documents deposited in their custody; that according to the law in India there was no distinction between the powers of an executor over the real pro-

perty and personal estate of a testator such as obtains in English law; that a purchaser or mortgagee from an executor who was also devisee obtained a free, complete, and valid title unaffected by the debts or legacies charged, unless it was clearly proved that the purchaser or mortgagee had notice of any fraud or breach of duty on the part of the devisee executor in the transaction; that the Bank did not know of the breach of trust on the part of the defendants 1 to 4 and was not a party to their fraud; and that the Bank were *bonâ fide* transferees for value of the properties comprised in their mortgage.

As to the findings on the 3rd and 4th issues the learned Judge said:

"If then I must presume from the fact that the Bank had notice of the recitals in Meenabai's will that they had notice of the charge in plaintiffs' favour under their father's will and of the capacity of the defendants 1 to 4 as absolute devisees and executors, I must deal with the equities between the parties to the mortgage on the footing that defendants 1 to 4 mortgaged the properties to the Bank in both the capacities and gave a good title unless it be proved that the Bank had knowledge that the loans advanced by them which formed the consideration for the mortgage were the personal debts of defendants 1 to 4."

And after considering the evidence as to that and the circumstances of the case bearing on the matter he concluded:—

"Upon the whole then I am not satisfied that the Bank knew of the breach of trust on the part of the defendants 1 to 4 and was a party to their fraud.

"The truth of the matter appears to me to be this. Judging from the evidence and the surrounding circumstances neither Labai and her adult son plaintiff No. 1 nor defendants 1 to 4 had any idea that the legacy in favour of the former was a charge on the property. All the parties lived amicably in the same house and thought as defendants 1 to 4 had the property absolutely bequeathed to them under their father's will they had every right to alineate it. Defendants 1 to 4 began to trade on their own account and the parties thought that that would bring in more money to them and enable them to make up the legacy to Labai and her sons. It cannot be that Labai and plaintiff 1 were unaware of the fact that defendants 1 to 4 had deposited their deeds with the Bank and were contracting debts. They hoped to share in the profits which defendants 1 to 4 were expected to make out of their trade by having their legacy provided out of those profits. The Bank were not informed of the legacy or the will because the parties believed that the legacy had nothing to do with the property bequeathed to defendants 1 to 4. When however they saw that Ahmedbhoy had fallen out with defendants 1 to 4 and the Bank

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were trying to enforce their rights under the mortgage, they (plaintiffs and defendants 1 to 4) found that plaintiffs had a charge and that that was a good weapon of attack. These are the probabilities of the case and they go to support the *bonâ fides* of the Bank. * * * * * * * *

Chandavarkar, J., also held that Meenabai had no power to dispose of the moiety of the Bhaji Pala Street property by will and that therefore the half part of that moiety which devolved on the plaintiffs was unaffected by the mortgage; and that the theatre on the land in Falkland Road was included in the mortgage to the Bank.

The decree was that the Bank had a prior charge on the properties mortgaged which comprised three-fourth parts of the house in Bhaji Pala Street, and the entirety of the land and buildings in Falkland Road; that the plaintiffs were entitled to the remaining one-fourth part of the house in Bhaji Pala Street; and they were entitled to a charge for the legacy in the will but ranking subsequently to the Bank's mortgage.

From that decision the plaintiffs appealed, and the Bank and Dwarkadas Dharamsey filed cross-objections claiming that the whole of the house in Bhaji Pala Street was comprised in their mortgage. The first four defendants appealed from the finding that the mortgage included the building on the land in Falkland Road.

The appeals were heard by Sir L. JENKINS, C. J., and BATTY, J., who agreed with the lower Court that the plaintiffs had a charge on the property; that the Bank had constructive notice of the will; and that there is according to Indian law no such distinction as there is in English law between moveable and immoveable property; but they held without impeaching the *bonâ fides* of the Bank, that the Bank's mortgage was subject to the payment of the plaintiff's legacy of Rs. 30,000. The material portion of the judgment, which was delivered by the Chief Justice, was as follows:—

"Though the 1st four defendants derive their title from the will of their father, it is not suggested that this was known to the Bank. This want of knowledge was not due to any concealment on the part of the mortgagors; the Bank made no investigation of title, and so far as the mortgage of the 12th

January 1899 goes took this security without any enquiry, assuming that the mortgagors were the owners of the property mortgaged. But ignorance resulting from abstention to make the ordinary investigations and enquiries cannot better the Bank's position. In not investigating the title under which he takes a person is ordinarily guilty of great and culpable negligence (*Jones* v. *Smith*(1) and *Neesom* v. *Clarkson*(2)) which disentiles him from defeating claims that would have come to his notice had he exercised reasonable care.

"The title therefore under the mortgage must be judged as though the Bank had actual notice of the will and its contents. What then would have been its knowledge with that notice? It would have seen that in his will the testator gave a list of his properties; that he gave all those properties to his four sons, the first four defendants; that he directed those four sons to whom, as he said, he *entrusted all his goods and property* to pay within 6 years the legacy in respect of which the plaintiffs now claim; that he described that legacy as directed to be paid out of his *abovementioned goods and property as a share of inheritance* by the first four defendants; and that he appointed his first four sons executors of his will.

"And so we have to see how matters would have stood had the Bank taken the mortgage with that knowledge.

"It must be borne in mind that for this purpose there is no such distinction here, as there has been in England, between moveable and immoveable property. The English authorities, therefore, which appear to me most pertinent, are those that relate to the disposition by executors of personal estate, and they have not been cited in argument either here or before the first Court. These authorities may legitimately be considered, for in regard to the questions at issue the law here and in England runs at parallel lines.

"I will first then consider the first four defendants' power to effect the mortgage as executors of their father's will.

"Executors have full power of disposal over their testator's estate, and generally speaking neither creditors nor legatees can follow assets aliened for value in exercise of that power. And so strong is this rule, that the alienees for value are safe in their title, though the alienation was for a purpose foreign to the will, if they took without notice of this vice. But if the alienees take with notice, then they are in no better position than the executors from whom they claim, and the assets can be followed in their hands both by creditors and by legatees, who have been prejudicially affected. *Elliot* v. *Merriman*(3), *Bonney* v. *Ridgard*(4), *Hill* v. *Simpson*(5).

(1) (1843) 1 Phillips 244 at p. 255, 1 Hare 43.
(2) (1842) 2 Hare 163 at p. 173.
(3) (1740) Barn. 78; 2 Atk. 41.
(4) (1784) 1 Cox. Ch. 145 cited in 4 Bro. Ch. C. 130.
(5) (1802) 7 Ves. Jun. 152.

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"We must therefore see whether in this case the money intended to be secured by the mortgage was applied in accordance with the duties of the first four defendants as executors. It is clear it was not: it was applied wholly for the private purposes of the executors, and this was a devastation of the testator's assets.

"Then, had the Bank notice of this? We start with the fact that the Bank admittedly did not deal with the first four defendants as executors, but as owners of the property mortgaged; this was conceded before us in argument and is a fair inference from what is stated in the mortgage. Then the consideration for the mortgage was not an advance at the time but an antecedent liability of the first four defendants; and the materiality of this is a matter of common and obvious comment: *M'Leod* v. *Drummond*(1).

"But the matter does not rest there, because the recitals in the deed clearly indicate that the liability arose in connection with partnership transactions in which the first four defendants were jointly engaged. From the recitals it appears that the liability was in respect of bills drawn by the mortgagors' Bombay firm on their Indore firm and the Bank's witness Chunilal states in reference to the Indore firm that they 'used to draw hundies on themselves in Bombay under instructions from the head office of the Bank of Bombay.' This point is not clearly made in the pleadings, but the Bank's Counsel raised the issue, 'Whether the Bank of Bombay were not *bonâ fide* transferees for value of the property mentioned in the mortgage,' and it was apparently discussed before Chandavarkar J. as it certainly was before us, without any complaint that it was outside the legitimate scope of the suit.

"On a consideration of all the materials in the case I hold that the Bank knew that the assets were applied to the private purposes of the executors, and that treating the mortgage, as I at present do, as one by the first four defendants in exercise of their executorial powers the Bank became a party to the devastation: see *Wilson* v. *Moore*(2). The result would be if things rested there that the plaintiffs as pecuniary legatees prejudiced by the mortgage could follow the assets into the hands of the Bank or its transferee.

"In coming to this conclusion I have not overlooked *Nugent* v. *Gifford*(3) and *Mead* v. *Lord Orrery*(4). But they cannot be regarded as authorities on the facts with which I have hitherto been dealing. Lord Brougham said of them in *Wilson* v. *Moore*(5): 'It is impossible to read the argument of Lord Hardwicke in each of these decisions without being satisfied that he considered the knowledge of the executors' misappropriation as not distinctly brought home to the party.' And in *M'Leod* v. *Drummond*(6) Lord Eldon says that 'It is impossible to deny that Sir Thomas Sewell in effect, and Lord Kenyon in terms, shook the authority of *Nugent* v. *Gifford*(3) and *Mead* v. *Lord*

(1) (1809-10) 17 Ves. Jun. 152 at p. 155.
(2) (1834) 1 Myl. & K. 337.
(3) (1738) 1 Atk. 463.
(4) (1745) 3 Atk. 235.
(5) (1834) 1 Myl. & K. 37 at p. 355.
(6) (1809-10) 17 Ves. Jun. 152 at p. 165.

Orrery(1); if those cases are supposed to establish doctrine so general as some of the dicta upon this subject import.' But in the suggested explanation of these cases it has been pointed out that in *Nugent* v. *Gifford*(2) the executor was the sole residuary legatee, and in *Mead* v. *Lord Orrery*(1) he was one of the residuary legatees: *M'Leod* v. *Drummond*(3), though Mr. Roper in his work on legacies maintains that this circumstance did not influence Lord Hardwick.

"And this leads me to consider how far it makes a difference in the case that the first four defendants were universal lagatees as well as executors. That this may in some respects alter the position is apparent from *Taylor* v. *Hawkins*(4), and *Graham* v. *Drummond*(5).

"In *Graham* v. *Drummond*(5) a second mortgage from an executor and residuary legatee was held to have a title which prevailed against creditors and Romer, J. (as he then was), in delivering judgment said: 'I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existance of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator.' Later the learned Judge says: 'The Chief reasons given are that unsatisfied creditors have no lien or charge on any asset, and that persons dealing with the executor in good faith are entitled to look to him alone, and are not bound to ascertain that all debts and liabilities have been discharged. For if they were so bound, they would never be safe in dealing for valuable consideration with any asset, even though a considerable time might have elapsed since the testator's death (as happened in the case before me), and so a legatee whose legacy was assented to by the executor would be unfairly and unduly hampered in dealing with it. Further, the case of an executor who is a residuary legatee dealing with an asset is the same in princip'e as the case of a legatee who is not executor, but whose legacy has been assented to by the executor, and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration.' But in *Graham* v. *Drummond*(5) as in *Taylor* v. *Hawkins*(4) it was a creditor who sought to impugn the alienation: here the plantiffs are legatees.

"This is not a fanciful distinction; it is recognised in *Spence's Equitable Jurisdiction*, Vol. II, p. 376, where it is said 'A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary lagatee, for the nature of the claims of legatees, they taking under the will, may be ascertained; but as to creditors it is different; if

(1) (1745) 3 Atk. 235.
(2) (1738) 1 Atk. 463.
(3) (1809-10) 17 Ves. Jun. 152 at p. 165.
(4) (1803) 8 Ves. Jun. 209.
(5) [1896] 1 Ch. 968.

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"We must therefore see whether in this case the money intended to be secured by the mortgage was applied in accordance with the duties of the first four defendants as executors. It is clear it was not: it was applied wholly for the private purposes of the executors, and this was a devastation of the testator's assets.

"Then, had the Bank notice of this? We start with the fact that the Bank admittedly did not deal with the first four defendants as executors, but as owners of the property mortgaged; this was conceded before us in argument and is a fair inference from what is stated in the mortgage. Then the consideration for the mortgage was not an advance at the time but an antecedent liability of the first four defendants; and the materiality of this is a matter of common and obvious comment: *M'Leod* v. *Drummond*(1).

"But the matter does not rest there, because the recitals in the deed clearly indicate that the liability arose in connection with partnership transactions in which the first four defendants were jointly engaged. From the recitals it appears that the liability was in respect of bills drawn by the mortgagors' Bombay firm on their Indore firm and the Bank's witness Chunilal states in reference to the Indore firm that they 'used to draw hundies on themselves in Bombay under instructions from the head office of the Bank of Bombay.' This point is not clearly made in the pleadings, but the Bank's Counsel raised the issue, 'Whether the Bank of Bombay were not *bonâ fide* transferees for value of the property mentioned in the mortgage,' and it was apparently discussed before Chandavarkar J. as it certainly was before us, without any complaint that it was outside the legitimate scope of the suit.

"On a consideration of all the materials in the case I hold that the Bank knew that the assets were applied to the private purposes of the executors, and that treating the mortgage, as I at present do, as one by the first four defendants in exercise of their executorial powers the Bank became a party to the devastation: see *Wilson* v. *Moore*(2). The result would be if things rested there that the plaintiffs as pecuniary legatees prejudiced by the mortgage could follow the assets into the hands of the Bank or its transferee.

"In coming to this conclusion I have not overlooked *Nugent* v. *Gifford*(3) and *Mead* v. *Lord Orrery*(4). But they cannot be regarded as authorities on the facts with which I have hitherto been dealing. Lord Brougham said of them in *Wilson* v. *Moore*(5): 'It is impossible to read the argument of Lord Hardwicke in each of these decisions without being satisfied that he considered the knowledge of the executors' misappropriation as not distinctly brought home to the party.' And in *M'Leod* v. *Drummond*(6) Lord Eldon says that 'It is impossible to deny that Sir Thomas Sewell in effect, and Lord Kenyon in terms, shook the authority of *Nugent* v. *Gifford*(3) and *Mead* v. *Lord*

(1) (1809-10) 17 Ves. Jun. 152 at p. 155.
(2) (1834) 1 Myl. & K. 337.
(3) (1738) 1 Atk. 463.
(4) (1745) 3 Atk. 235.
(5) (1834) 1 Myl. & K. 37 at p. 355.
(6) (1809-10) 17 Ves. Jun. 152 at p. 165.

Orrery(1); if those cases are supposed to establish doctrine so general as some of the dicta upon this subject import.' But in the suggested explanation of these cases it has been pointed out that in *Nugent* v. *Gifford*(2) the executor was the sole residuary legatee, and in *Mead* v. *Lord Orrery*(1) he was one of the residuary legatees: *M'Leod* v. *Drummond*(3), though Mr. Roper in his work on legacies maintains that this circumstance did not influence Lord Hardwick.

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(5) [1896] 1 Ch. 968.

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a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets to payment of the debts, if any; therefore the mortgagee would be safe as against creditors.'

"If the view of Chandavarkar, J., is correct, there is a still further distinction, for he held that the legacy was charged on the property in suit, while the decision in *Graham* v. *Drummond*(1) proceeded on the ground that 'unsatisfied creditors have no lien or charge on any asset'. In support of this view Chandavarkar, J., has relied not only on the language of the will as rendered in the translation before the Court, but also on the vernacular, which seemed to him to bring out the intention still more clearly.

"I have nothing to add to the reasoning of the learned Judge on this point; my only doubt has been whether it can be said that the charge is nugatory and inoperative, as adding nothing to the obligations that would exist without it: *cf. Scott* v. *Jones*(2); *Freake* v. *Cranefeldt*(3). But agreeing as I do with Chandavarkar J. as to the effect of the will, I think there is a charge on specific property which has a legal operation: *cf. Girish Chunder Maiti* v. *Anundo Moyi Debi*(4). The testator in the first clause of the will enumerates the items of which his property at that time consisted and he therein mentions the property in suit. It is on the 'above mentioned goods and property', that the charge is imposed, and though in fact he died two days after the execution of the will, he might have acquired other property, to which this express charge would not have applied.

"Had the Bank's advisers seen the will they would have learnt of the legacy and that it was charged on the property in suit. This must have led to the enquiry whether the legacy had been discharged, and we must assume that an honest and not a false answer would have been given: *In re Morgan*(5) and *In re The Alms Corn Charity*(6). That answer must have been that the legacy had not been satisfied, and if the Bank took with knowledge of that fact, it would have held subject to the charge.

"I see no reason to suppose that the mortgagors would have met the enquiry with the answer that the Bank must be satisfied with the fact that the mortgagors were both executors and legatees of the property and must take that as evidence of assent, for even apart from the specific charge it would have been wrong on their part to have deprived the legatees of the right they had to have the property realized for payment of the legacy, and we ought not to presume that they would have done an act which would have been a breach of trust: *In re Queale's Estate*(7).

(1) [1896] 1 Ch. 968.
(2) (1838) 4 Cl. & F. 382.
(3) (1838) 3 Myl. & Cr. 499.
(4) (1887) 15 Cal. 66: L. R. 14 I. A. 137.
(5) (1881) 18 Ch. D. 93 at p. 102.
(6) [1901] 2 Ch. 750 at p. 762.
(7) (1886) 17 Ir. L. R. Ch. D. 361 at p. 368.

"This last cited case, a decision of the Court of Appeal in Ireland, bears a striking resemblance to the present, and there the Bank, a mortgagee by deposit of title deeds, was held to be postponed to a pecuniary legatee who had no specific charge.

"No doubt some reliance is placed on the fact that the mortgage was only equitable, but the cases seem to show that for the purpose in hand it makes no difference that the assignee or mortgagee does not obtain the legal estate in or legal control over the asset: see *Graham* v. *Drummond*(1).

"The question seems to hinge not so much on the character of the disposition as upon whether the circumstances justified the inference that the mortgagor was in possession as legatee and not as executor, and on this point the reasoning in the Irish decision is closely applicable to the facts of this case.

"Mr. Roper in his work on Legacies at page 443 deals with a disposal of an asset by one in whom the double character of executor and legatee is combined, and after pointing out that as mere executor his disposal of assets to pay or secure his own debt would not prejudice individuals interested under the testator's will, he says, 'and as residuary legatee he could only dispose of what he was entitled to in that character, *viz.*, what remained after all the trusts of the will were performed. It appears then that the accident of an executor being also residuary legatee cannot upon principle impart to him any larger authority over the assets than what he possessed by virtue of his office as executor.' No doubt the learned author does not here notice the implication of assent to which Romer, J., alludes in *Graham* v. *Drummond*(1) but the passage shows what in his opinion the position would be apart from assent. Here there was no representation to the Bank that the mortgagors were legatees to whose legacy an assent had been given; the Bank had no knowledge and sought no knowledge as to the title; and as I have already said we ought not (in my opinion) to presume that the mortgagors would have made any representation involving a breach of trust.

"In Mr. Lewin's book on Trusts, pages 529, 530 of the 9th Edition, we have a conveyancer's view of the position.

"The whole doctrine which enables an executor legatee to dispose of a testator's assets to the detriment of claimants under the will is founded on convenience; but I cannot see in the circumstances of this case anything that requires us on that score to treat the Bank as alienees free from the legacy bequeathed by the will.

"It is true that in the cases there are expressions which point to fraud or collusion as being an essential element but this is not an exhaustive statement of the law. *Hill* v. *Simpson*(2) shows that gross negligence will suffice. There an executor and residuary legatee assigned to his bankers certain stocks

(1) [1896] 1 Ch. 968 at p. 975. (2) (1802) 7 Ves. Jun. 152.

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as a security for his private debt, and the Bank accepted without looking at the will his representation that he was residuary legatee subject only to a few small legacies. It was, however, held by Sir William Grant that the funds were liable to answer the demands of persons treated as being in the position of pecuniary legatees. The Master of the Rolls in the course of his judgment remarked 'common prudence required that they should look at the will, and not take the debtor's word as to his right under it. If they neglect that and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud; but they acted rashly, incautiously and without the common attention used in the ordinary course of business; the reference in the will of Mrs. Smith to the will of her husband making it the same as if a legatee of her own was disappointed by this. It was gross negligence not to look at the will under which alone a title could be given to them. It was not necessary to use any exertion to obtain information which without extraordinary neglect they could not avoid receiving. No transaction with executors can be rendered unsafe by holding that assets transferred under such circumstances may be followed.' So here, I do not impute direct fraud to the Bank, but it certainly was guilty of gross negligence unless (as the circumstances suggest) the Bank was content to get what it could, and so that its conduct should be judged not by the standard of one exercising an unfettered choice, but of one seeking to secure a desperate debt as best he can.

"There is much in common between the facts of *Hill* v. *Simpson*(1) and those now under consideration, the principal divergence being the difference in the time that elapsed between the coming into operation of the will and the impugned disposition. There as here we find a complete transfer by way of security while the present case is stronger in that there the claimant was treated as being in the position of a simple pecuniary legatee without a specific charge. No doubt here there is the difference that a considerable time had elapsed between the death of the testator and the mortgage in suit, but in the opinion of Chatterton, V. C., 'the circumstance that there the transaction was very shortly after the death of the testator was not the only or even the main ground on which the Master of the Rolls grounded his decision'. *Connolly* v. *Munster Bank*(2).

"Moreover *In re Queale's Estate*(3) shows that lapse of time is not necessarily a bar where, as here, possession is consistent with the purposes of the will, and in the argument before us no contention was based on the lapse of time as a bar to the suit or a circumstance affecting the rights of the parties.

"Hitherto I have dealt with the cases as though the Bank's claim rested on the mortgage of the 12th of January 1899, and on that alone and as a consequence that the charge was to secure an antecedent debt. But Mr. Inverarity

(1) (1802) 7 Ves. Jun. 152. (2) (1887) Ir. L. R. 19 Ch. D. 119 at p. 127.
(3) (1883) Ir. L. R. 17 Ch. D. 361.

has sought to escape from this position and the inferences it involves, by suggesting that long before this there had been a mortgage by deposit of title deeds; therefore, he argues it cannot be said that the security originally was for an antecedent debt. But no reference is made to this in the Bank's written statement nor was any issue raised on the point. The evidence as to the deposit is of the vaguest description and leaves it absolutely uncertain what was the liability in respect of which the deposit was made. There certainly is no ground to assume that the documents of title were deposited to secure a contemporaneous advance: for the deposit alleged is said to have been made in 1890 while the evidence of the 1st defendant is that his firm began to get credit from the Bank of Bombay about a year or a year and a half after his father's death, *i. e.*, in 1836 or 1887 and this is confirmed by Ex. A 4.

"I must not omit to notice the learned Judge's determination that clause 10 of the will does not forward the Bank's claim. Apparently it was never suggested until the plaintiff's reply that the clause had any bearing on the case, and then the suggestion proceeded from the learned Judge who on further reflection decided not to hear the plaintiffs' Counsel on the point, having regard to the admitted facts of the case and the terms of the will. It is admitted that the testator carried on a business in his lifetime and that the business of the partnership in respect of which the indebtedness was incurred was in no sense a continuance of it, and it is manifest that the Bank was not misled or influenced by the presence of this clause. In the circumstances therefore I am of opinion that the Bank's position is in no way bettered by clause 10 of the will.

"I see that in the course of his judgment it is said by Chandavarkar, J., that 'It cannot be that Labai and plaintiff No. 1 were unaware of the fact that defendants 1 to 4 had deposited their deeds with the Bank and were contracting debts'. If by that is meant that Labai and plaintiff No. 1 knowingly stood by and permitted defendants 1 to 4 to deal with the Bank as if they were the absolute owners of the mortgaged property, it so far as these two were concerned might have made a material difference in their rights. But no plea to this effect is to be found in the pleadings nor is the point raised in the issues; not a word in support of this view was urged in the course of the argument before us, and I cannot find any real foundation for it in the evidence. The first plaintiff distinctly says that the first intimation he had of the mortgage was in June 1903. I think therefore the suggestion of the learned Judge can be no more than mere speculation and impression and therefore not a legitimate basis for legal decision.

"The conclusion therefore to which I have come on this part of the case is that the plaintiffs' claim must prevail over the mortgage to the Bank and the title of its transferee."

The appellate Court dismissed the appeal of the first four defendants and overruled the objections taken by the Bank and Dwarkadas Dharamsey, and concluded—

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"We must declare that the undivided moiety of the house in Bhaji Pala Street, and the property in Falkland Road left by the will of Khoja Somji Parpia, deceased, form part of the estate of the testator and are as such available for the payment of the plaintiffs' legacy in priority to the claim thereon of the Bank as mortgagee of the same and of its transferee the defendant Dwarkadas Dharamsey.

"The decree must therefore contain a declaration to the above effect."

On this appeal *Sir R. Finlay, K. C.*; *Levett, K. C.*; and *Frank Russell, K. C.*, for the appellants contended that under their mortgage the Bank of Bombay had a complete title to the property mortgaged and not subject to any charge created by the will of Somji Parpia. The mortgage had been executed in good faith and for valuable consideration by the executors of the will who were also residuary legatees, and the Bank was fully justified in believing that their mortgagors were competent to give them a good title. Under the law of India the executors had full power to dispose as they thought fit of all property moveable or immoveable vested in them as executors. The Probate and Administration Act (V of 1881), sections 4, 90, 113, 115, 116, and the Amending Act (IV of 1889), section 14, were refered to. The Bank had no notice, actual or constructive, of the existence of any charge on the property in priority to their mortgage. Under those circumstances, and considering that the Bank had no notice of any other ground which rendered it improper for the executors to deal with the property under the will as the mortgagors had done, the Bank's mortgage was, it was submitted, valid against any unsatisfied creditors of the testator. Reference was made to *Graham* v. *Drummond*(1); *In re Whistler*(2); *Colyer* v. *Finch*(3); and *In re Venn and Furze's Contract*(4). The two last cited cases showed that the fact that the mortgage purported to secure a debt due from the mortgagors personally was immaterial and did not affect the title of the mortgagee. But even assuming that the Bank had constructive notice of the will, the fact that the mortgage was executed 14 years after the death of the testator entitled the Bank to assume that at the time of its execution the legacy now said to be a charge on the property

(1) [1893] 1 Ch. 968 at pp. 971—974.
(2) (1887) 35 Ch. D. 561.
(3) (1856) 5 H. L. C. 905.
(4) [1894] 2 Ch. 101 (111, 114).

mortgaged had been paid, especially as by the terms of the will it was payable within 6 years after the testator's death; and it was not necessary for the Bank to inquire whether it had been paid or not. Reference was made to *In re Queale's Estate* (1) relied upon by the Appellate Court in India which it was contended was distinguished from the present case by the length of time that had elapsed between Somji Parpia's death and the execution of the mortgage; and by the fact that in the case in Ireland the mortgage was merely an equitable one. Lewin on Trusts, 11th Ed., page 557, was also referred to. The executors had full power to pledge the assets of the testator's estate, and no concurrence or assent of the plaintiffs was necessary to free the mortgage, at its execution, from the charge, if any, created by the will.

Danckwerts, K. C., and *P. S. Stokes* for the plaintiff-respondents contended that the Appeal Court in India had rightly held that the mortgage to the Bank was subject to the charge in favour of the plaintiffs under the will of Somji Parpia. Some facts had been concurrently found by both the Courts in India, one of which was that the Bank had constructive notice of the charge created by the will on the estate, and the rights of the plaintiffs under it. That being so, and the defect in the title of the executors and mortgagors to mortgage the property appearing on the face of the documents of title deposited with the Bank, the latter were thereby put upon inquiry and were guilty of negligence in not calling for and investigating the title of the mortgagors to the property comprised in the mortgage, and must be held to have taken the mortgage subject to the charge on it created by the will. Reference was made to *Agra Bank, Limited*, v. *Barry* (2); *Corser* v. *Cartwright* (3), as to constructive notice through Solicitors, the latter case showing that the plea that the mortgage was for value without notice was no protection where the Bank might have had notice by using due diligence in investigating the title; *Jackson* v. *Rowe* (4); *Jones* v. *Smith* (5); *Patman* v. *Harland* (6), where an express representation by the vendor that a deed

(1) (1886) Ir. L. R. 17 Ch. D. 361.
(2) (1874) L. R. 7 H. L. 135 (157).
(3) (1875) L. R. 7 H. L. 731.
(4) (1826) 2 Sim. & Stu. 472.
(5) (1841) 1 Hare 43 : 1 Phillips 244.
(6) (1881) 17 Ch. D. 353.

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did not affect his title was held not to protect a mortgagee or purchaser who had not looked at the deed; *Wilson* v. *Hart*[1]; and *In re Whistler*[2].

Another fact concurrently found by the Courts below was that the mortgage was executed on account of money borrowed to pay pre-existing debts of the mortgagors; it was therefore not in respect of matters or transactions or for purposes authorised by the will, and the Appellate Court in India found that the money had been in fact applied to the private purposes of the executors and mortgagors. As to this it was contended that, for such purposes, the mortgagors had no power to pledge the assets of the testator to the prejudice of any charge the plaintiffs had under the will, and that the fact that they were also residuary legatees could not give them any larger authority over the assets than they had as executors, their power as residuary legatees being limited to disposing of what they were entitled to in that capacity after all the trusts of the will had been performed, that, in short, the Bank could not acquire from their mortgagors any greater interest than those mortgagors themselves had in the property under the will. Reference was made to Roper on Legacies, page 443; and on the construction of the will *In re Kirk*[3], and *Wigg* v. *Wigg*[4] were cited.

As to the powers of an executor under the will of a Mahomedan the case of *Shaik Moosa* v. *Shaik Essa*[5] was cited; and the Succession Act (X of 1865), section 271; and the Probate and Administration Act (V of 1881), sections 2, 4, 5, 12 and 90, were referred to.

As to the advantages to the plaintiffs of their being not merely creditors, but legatees with a specific charge on the testator's estate the arguments and authorities cited in the judgment of the High Court on appeal were adopted; and that judgment, it was submitted, should be affirmed.

(1) (1866) L. R. 1 Ch. 463 (466, 467).
(2) (1887) 35 Ch. D. 561.
(3) (1882) 21 Ch. D. 431 (437).
(4) (1739) 1 Atk. 383.
(5) (1884) 8 Bom. 241.

Levelt, K. C., replied, referring to *Graham* v. *Drummond*[1]; *Mead* v. *Lord Orrery*[2]; and *Taylor* v. *Hawkins*[3] [*Danckwerts, K. C.*, with reference to the two last named cases cited *In re Morgan*[4], and *In re The Alms Corn Charity*[5].]

1908, July 21st:—The judgment of their Lordships was delivered by—

SIR ANDREW SCOBLE:—The facts relating to this appeal are not in dispute, and may be shortly stated.

Somji Parpia died on the 15th February 1885. He left eight sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife Labai, who also survived him. By his will, he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow Labai and his younger sons. Both Courts in India have found that this legacy was charged upon the property in suit, and their Lordships agree with this decision.

After their father's death, the elder sons entered upon large business transactions, under the style of Somji Parpia & Co., and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances, the elder sons, on the 1st September 1890, deposited certain title-deeds relating to the property in suit, by way of equitable mortgage, with the Bank; and on the 12th of January 1899 the Bank obtained from them a formal mortgage of the same property, to secure the repayment of Rs. 52,000 in respect of bills then due or to become due drawn by the firm on their Indore branch. It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time, and still is, unsatisfied.

The property comprised in the mortgage consisted of a house in Bhaji Pala Street and a piece of land in the Falkland Road, in the City of Bombay, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified

(1) [1896] 1 Ch. 968 (974).
(2) (1745) 3 Atk. 235 (241).
(3) (1803) 8 Ves. Jun. 209.
(4) (1881) 18 Ch. D. 93 (103).
(5) [1901] 2 Ch. 750 (762).

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by their father Somji Parpia, in his will, as subject to the charge of Rs. 30,000 in favour of his widow and younger sons. This will was not among the documents of title deposited with the Bank, but the root of the title to the house in Bhaji Pala Street, the more valuable of the two properties, was indicated in the will of Meenabai, widow of Somji Parpia's father Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint property of the two brothers, and if the Bank's legal advisers had made any investigation of title, they must have enquired how Somji's share had come to the mortgagors, and in this way obtained cognizance of his will, and of the charge on this portion of his estate. But they made no enquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged. It is not suggested that the mortgagors practised any concealment of the real facts of the case; and if they had been asked about their father's will, it is to be presumed that they would have given an honest answer.

Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the Bank. But when the Bank advertised the properties for sale, they filed this suit in order to establish the priority of their charge over the mortgage to the Bank. And the only question in this appeal is whether they are entitled to such priority.

Mr. Levett, in his able argument for the appellants, contended that, under the will of Somji Parpia, the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of Romer, J., in *Graham* v. *Drummond*[1] in which that learned Judge says (at p. 974):—

"I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator."

But this does not dispose of the present case. Here the plaintiffs are legatees, and the distinction between creditors and

[1] [1896] 1 Ch. 968 at p. 974.

legatees is well pointed out in Spence's "Equitable Jurisdiction," Vol. II., p. 376, where it is said :—

"A mortgage by an executor, who is also residuary legatee, to secure his private debt, may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained : but as to creditors it is different; if a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts if any ; therefore the mortgagee would be safe as against creditors."

Moreover, in this case, the mortgagee had constructive notice, and has only himself to thank if his position is not safe; for had he taken the slightest pains to investigate the title of the mortgagors he must certainly have discovered the charge created by the will of Somji in favour of the widow and her sons.

It was also contended that by the terms of the will the legacy was to be made up and paid within six years after the testator's decease; that this period would have expired in 1891, eight years before the date of the mortgage; and that, assuming notice of the will on the part of the Bank, the Bank was entitled to assume that the executors were acting with the consent of the legatees. Lapse of time is, no doubt, a circumstance that may be taken into consideration in cases of this kind ; but having regard to the fact that, in this case, two of the younger sons were still minors when the title-deeds were deposited with the Bank, and that continued possession by the elder sons was not inconsistent with the purposes of the will, their Lordships agree with the Court below in holding the rights of the parties unaffected by this circumstance.

The case of *In re Queale's Estate*[1] bears a strong resemblance, in its facts, to that now under consideration. There the testator's son deposited with a Bank three leases to secure his own overdrawn account. The Bank dealt with him as absolute owner, and eventually proceeded to sell the leaseholds ; whereupon the testator's daughters claimed to be placed on the schedule as encumbrancers in respect of unpaid legacies, and their claim was allowed. In delivering judgment, FitzGibbon, L. J., says :—

(1) (1886) Ir. L. R. 17 Ch. D. 361.

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"The Bank dealt with him (the mortgagor) as, and in his capacity of, an individual owner—not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances the Bank can, in my opinion, have no better title than that which its creditor really had in the capacity in which he was dealt with, namely, as beneficial owner, *i.e.*, as residuary legatee."

Their Lordships agree with the learned Judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the Bank and the title of its transferee, Dwarkadas Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court of the 14th April 1905 confirmed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants :—*Cameron Kemm & Co.*
Solicitors for the respondents :—*Rawle Johnstone & Co.*

J. V. W.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR *v.* DHONDU BIN KRISHNA KAMBLYA.*

1904. *February* 4.

Workman's Breach of Contract Act (XIII of 1859), sections 1, 2—Summary inquiry into an offence punishable under the Workman's Breach of Contract Act—Court Fees Act (VII of 1870), section 31—Court fee on petition of complaint—Liability of the workman to pay.

An offence under the Workman's Breach of Contract Act (XIII of 1859) cannot be tried summarily. A penal enactment must be construed strictly. The proceedings of the Magistrate, under the Act, up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any offence as defined in the Criminal Procedure Code.

In a proceeding under the Workman's Compensation Act where the workman admits the advance and repays the same it is not competent to the Magistrate to make him pay to the complainant the Court fee paid on the petition of complaint.

*Criminal Reference No. 142 of 1903.

1904.

EMPEROR v. DHONDU.

THIS was a reference made by Mr. J. K. Kabraji, District Magistrate of Ratnagiri.

The reference was in the following terms :—

1. In this case the complainant Gharu Rama Pilankar complained that the accused Dhondu bin Krishna Kamblya having agreed to serve as a Khalashi on the complainant's ship on condition of his paying him Rs. 25 in addition to food for a season of 7 months, received Rs. 3 in advance ; that it was agreed two rupees more would be given to the accused at the time of sailing ; that the accused wanted the balance earlier which the complainant refused to pay ; however the complainant paid him two annas in the interval ; that the accused worked for 3 days on the ship and left the service and thus committed a breach of contract of service punishable under section 2 of Act XIII of 1859. The accused almost admitted these allegations and stated that in consequence of the ill-treatment by the tindal of the ship employed by the complainant he left the service. The Magistrate held the accused liable for the breach of the contract.

2. The accused was summarily tried and convicted of the breach under section 2 of Act XIII of 1859 and ordered by Mr. A. R. Chitre, Magistrate, First Class, Ratnagiri, to pay the complainant Rs.3 and annas 2 advanced by him in addition to Rs. 1-4-0 on account of the expenses incurred in the prosecution by the complainant.

3. The order awarding the expenses in the prosecution made presumably under section 31 of the Court Fee Act as well as the conviction are considered illegal and are recommended to be quashed and the whole amount awarded to be ordered to be repaid.

4. The conviction is considered illegal inasmuch as the case cannot be tried summarily, and enquiry to be made under section 2 of Act XIII of 1859 not being an enquiry into an offence which may be tried summarily (I. L. R. 4 Mad. 234). The order about the payment of compensation is considered wrong on the ground that according to section 2 of the Act, the Magistrate is to order only the repayment of the money advanced or such part thereof as may seem to the Magistrate just and proper (High Court Ruling 2 of 1891). Further, according to the same section the workman must be shown to have wilfully and without lawful and reasonable excuse neglected or refused to perform the work contracted, but from the papers of the case it does not appear that the Magistrate has found this to be so.

The reference came up for disposal before Chandavarkar and Aston, JJ.

PER CURIAM.—The question whether an offence under Act XIII of 1859 can be tried summarily has been answered in the affirmative by the Madras High Court in *In re Higgins* (Weir's Criminal Rulings, p. 466) and by the Allahabad High Court in

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Queen Empress v. *Indarjit* (1) and in the negative by the former Court in another case, *Pollard* v. *Mothial* (2). We prefer to follow the ruling last cited. A penal enactment must be construed strictly and it appears to us that under Act XIII of 1859, sections 1 and 2, the proceedings of the Magistrate up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any "offence" as defined in the Criminal Procedure Code. Where there has been a wilful neglect or refusal on the part of a person to perform his part of the contract, the Statute enables the Magistrate to give at the option of the complainant to such person a *locus pœnitentiæ* by ordering him either to return the advance or perform the contract. If he obeys the order, he commits no offence. It is only when the order has been disobeyed that there is "an act or omission, made punishable" by the law and falling within the definition of "offence" in the Criminal Procedure Code. The Magistrate has only then jurisdiction to deal with the disobedience of his order and sentence the person who has disobeyed to imprisonment.

There is no doubt this to be said for the contrary view that, having regard to the recital in the preamble that "it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment," and to the provisions of section 1 enabling the party aggrieved by such breach to make a complaint to a Magistrate and the Magistrate to issue a summons or warrant, it was the intention of the Legislature to treat such fraudulent breaches as "offences," and that, though the punishment provided is only for disobedience of the Magistrate's order, yet it is in reality punishment for the fraudulent breach. This view of the Act has been suggested in *Queen-Empress* v. *Kattayan* (3). There is no express decision of this Court on the point, but had that been the intention of the Legislature they would have said that the punishment provided was for the fraudulent breach itself, not for disobedience of the order of the Magistrate.

(1) (1889) 11 All. 262. (2) (1881) 4 Mad. 234.
(3) (1897) 20 Mad. 235.

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The order of the Magistrate awarding the expenses of the prosecution is illegal (see *Imperatrix* v. *Budhu Devu*) [1]. As was held there, the repayment to the complainant of the Court fee paid on his petition of complaint could only be ordered "in addition to the penalty imposed" upon the person complained against and no penalty could be imposed till the person complained against had disobeyed the order for the payment of the sum advanced to him.

As the person complained against admitted the advance made to him and agreed to repay it and has repaid it, no prejudice can be said to have been caused to him by the summary trial held by the Magistrate and we decline to interfere with that part of the order which directed repayment. But we set aside the order as to Rs. 1-4-0 and direct that the complainant do refund it to Dhondu bin Krishna Kamblya.

R. R.

(1) (1891) Cri. Rul. No. 2 : Unrep. Cri. Cas. 534.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR *v.* BALU SALUJI.*

1903.

: October 13.

Workman's Breach of Contract Act (XIII of 1859)—Inquiry under the Act—Summary trial not permissible.

An offence under the Workman's Breach of Contract Act, 1859, cannot be tried summarily.

Emperor v. *Dhondu Krishna*[1], followed.

THIS was a reference made by F. J. Varley, Acting Sessions Judge of Ahmednagar.

The reference was in the following terms :—

2. (i) The facts out of which this reference arose are that the accused Balu Saluji passed a *nokarnama* to do certain weaving work, in consideration of a sum of Rs. 99, which he wilfully and without lawful excuse failed to perform.

(ii) Mr. R. B. Phansalkar, Magistrate, First Class, Sangamner, who tried the case under Act XIII of 1859 directed the accused under section 2 to repay

* Criminal Reference No. 92 of 1903.

(1) (1904) *ante* p. 22 : 6 Bom. L. R. 255.

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Rs. 99 to the complainant within 15 days. The accused having failed to comply with the order has been sentenced by the said Magistrate to two months' rigorous imprisonment or until such sum has been sooner paid.

(iii) Summary nature of the trial.

(iv) Reasons. It has been laid down in *Emperor* v. *Dhondu* reported at 6 Bom. L. R. 255, that offences under Act XIII of 1859 are not triable summarily. The practice of the Magistrates in this district varies considerably. At the time when the reported reference was made, the contrary view was not pressed upon the attention of their Lordships who heard the reference. They say "We prefer to follow I. L. R. 4 Mad. 234," while saying "there is no doubt this to be said for the contrary view" . . . that the preamble seems to prescribe punishment for fraudulent breach of contract.

The District Magistrate has appeared through the Public Prosecutor and adduced the following considerations for the contrary view:—

(i) The word "complaint" is used in section 1, and complaint is defined in section 4, Criminal Procedure Code, as "an allegation made to a Magistrate with a view to his taking action under the Criminal Procedure Code." Had the breach been merely disobedience of the Magistrate's preliminary order, the word "application" would have been used.

(ii) It is the practice of some Magistrates to pass preliminary order while some make the order and penalty on failure to comply in one and the same order, the latter seems to be justified by the fact that the wording of section 2 is not disjunctive. "And, if . . .".

3. The following considerations appear also to the Court to have weight.

(i) The penalty is 3 months' imprisonment and this is within the limit of summary jurisdiction.

(ii) The order is conditional "or until such sum of money be sooner paid," so the workman is not prejudiced.

(iii) Summary jurisdiction is exercised by Magistrates of experience, and they only take action under Act XIII of 1859 when the case is a clear one. If a regular procedure be prescribed, the object of the Act will be largely defeated, for an element of delay will be introduced, and the remedy of masters and employers will be as speedily obtained through the Civil Courts, though the Act was designedly framed to avoid the necessity of resorting to the Civil Courts.

4. The necessity for making this reference arises as it is desirable to have the point cleared up definitely, whether cases under the Act XIII of 1859 can be legally tried in a summary manner or not.

The reference was heard by Chandavarkar and Heaton, JJ.

M. B. Chaubal, Government Pleader, for the Crown.

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PER CURIAM.—The law enunciated in *Emperor* v. *Dhondu*[1] ought, we think, to be followed. It is in accordance with the rule of construction applicable to an Act, such as Act XIII of 1859. That rule is well explained by Lord Herschell in *Derby Corporation* v. *Derbyshire County Council*[2]. The action there was a proceeding in the County Court under the 10th section of the Rivers Pollution Act, 1876, under which a County Court Judge had power to order any person to abstain from polluting a river and the said person might be required to perform that duty in the manner specified in the order. If the order were disobeyed, the County Court Judge had jurisdiction to impose a penalty not exceeding £50 a day, as he should think reasonable.

As Lord Herschell says in his judgment, the proceeding in which the County Court Judge orders any person to abstain from polluting the river and requires him to perform that duty in a specified manner is not a penal proceeding, because "all it can end in is an order under such terms and conditions as the County Court Judge thinks reasonable to prevent or abate a nuisance." Then his Lordship goes on: "The Legislature has provided that if that order is disobeyed then the County Court Judge may impose a penalty . . . That is a separate and independent proceeding. It is true it is taken, as it is said, in the action or the proceeding, but it is really a separate proceeding in which the penalty for disobedience is imposed".

This Court, therefore, quashes the orders in this case. The lower Court will be at liberty to take fresh proceedings according to law.

Order set aside.

R. R.

(1) (1904) *ante* p. 22 : 6 Bom. L. R. 255.

(2) [1897] A. C. 550.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

1908. *July* 1.

THE TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY, APPELLANTS, *v.* KARSANDAS NATHU AND OTHERS, RESPONDENTS.*

Compulsory acquisition of land—Compensation—Method of hypothetical development for fixing value of land to be acquired—Charges as to the costs of the speculator—Compensation based on sales of lands into suitable building sites—The two methods employed in conjunction and producing the same result.

The method of hypothetical development is open to the objection that it involves or presupposes the intermediation of a third person, called the speculator or exploiter, that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes.

The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then, no doubt, allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself.

When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building, it is not only necessary but inappropriate to make a special deduction on account of the small area marked off for the roadway.

Where the method of hypothetical development is employed for assessing compensation in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neighbouring lands, and the consequence is that the two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence but also that the method of hypothetical development is itself corroborated.

In the method of arriving at a valuation of land by reference to prices realised by sales of neighbouring lands, it is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the particular land in question. Differences small or great exist in

* First appeal No. 157 of 1906.

various conditions, and what precise allowance should be made for these differences is not a matter which can be reduced to any hard and fast rule.

APPEAL from the decision of the Tribunal of Appeal, constituted by the City of Bombay Improvement Act (Bombay Act IV of 1898).

The facts are set forth in the judgment.

Robertson and *Jardine* (with *Crawford, Brown & Co.*) for the appellants.

Inverarity, Setalvad and *Jinnah* (with *Nanu & Co.*) for the respondents.

BATCHELOR, J.:—This is an appeal by the Trustees for the Improvement of the City of Bombay against an award of the Tribunal of Appeal appointed under section 48 (3) of Bombay Act IV of 1898.

The area of the land taken up is 5,576 square yards and the Special Collector awarded a total sum of Rs. 65,511-2-0. On reference to the Tribunal, the Tribunal has increased that award to a total sum of Rs. 87,798. This works out to an average of Rs. 15-11-0 per square yard according to the present appellants, and to a few annas less according to the respondents. With this small difference we are not further concerned, and the real question before us—when all is said and done—amounts to this: Is the allowance of Rs. 15-11-0 per square yard shown to be excessive?

Apart from the general principle which restrains a Court of civil appeal from interfering with any decree unless it is satisfied that that decree is wrong, we have here two special considerations which should deter us from lightly disturbing the award under appeal. One of these considerations is that the matter in dispute is one where absolute precision or mathematical accuracy is not attainable; and the other consideration is that the Tribunal of Appeal has acquired long and valuable experience in these matters of valuation, with which alone the present controversy is concerned. Upon this point we follow the principle enunciated by Sir Lawrence Jenkins in *Anandrav Vinayak* v. *Secretary of*

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State.[1] And the result is that before interfering with the award, we must be clearly satisfied that it is substantially erroneous.

Now the Tribunal has grounded its decision largely upon the footing that the land under acquisition is conceived to have been laid out in small plots for building purposes, inasmuch as that admittedly is here and now the most profitable method for the disposal of such property as this. It was admitted before the Tribunal that the land should be valued as laid out for building purposes in these small plots, and should not be valued merely as one integral parcel of land.

The method adopted by the Tribunal has been described as the method of hypothetical development. And for the purposes of this case, we will adopt that description without pausing to investigate its accuracy. Now the objection offered to this method is—as we understand it—that it involves or presupposes the intermediation of a third person whom you may call the speculator or exploiter, that is to say, a person who purchases this land wholesale from the claimant in order afterwards to sell it retail for building purposes.

The whole case of the appellants, as it seems to us, depends upon this presupposition being made good; and in our opinion it is not made good. The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on the most profitable terms. There is no doubt that here, as we have said, the most profitable method of disposing of it is to lay it out in small parcels for building sites. And the owner, it seems to us, is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then no doubt allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And for our own part we can see no necessary reason why the claimant should be

(1) (1905) 29 Bom. 565.

driven to have recourse to the speculator for a business which he could do for himself.

It is true of course that, on the case we are now putting, we are assuming a sale which could not be completed in a day. But the Tribunal of Appeal has made ample allowance for this consideration and has reckoned a period of two years as the period which would be required for the completion of the sale. Upon this footing it has written back the total sum for one year at 6 per cent. which seems to us to give an adequate provision for the period over which the realisation of income will be spread.

When this deduction is made, we are of opinion that the resulting figure does give us the present market value of the land of the claimant, subject of course to such minor expenses as would be incurred by advertising, planmaking, etc., for which Rs. 500 have been allowed by the Tribunal.

Complaint was made that no separate allowance or deduction had been made on account of the passage or roadway shown in the plan. But if we are right in the foregoing observations upon the general principle adopted by the Tribunal, we do not think that this particular argument of the appellants has any weight, for when once you have adopted the general principle of a sale of the land split up into parcels suitable for building, it appears not only unnecessary but inappropriate to make a special deduction on account of the small area marked off for the roadway. For the Tribunal has found that the whole site is worth to the claimant Rs. 15-11-0 per square yard over all, and in that whole site is included the area set aside for the roadway. The evidence shows not only that this point was not overlooked by the Tribunal, but also that it is not unusual for the purchaser of a plot adjoining the roadway to pay for half the roadway, as well as for the site actually available for building.

So much then as to this special method of valuation which the Tribunal in this instance has invoked for its assistance. But it is important to observe that the Tribunal has not relied exclusively upon this method. It has employed this method in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neigh-

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bouring lands. And since the consequence is that these two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence, but also that the method of hypothetical development is itself corroborated.

We have looked into the evidence as to sales of neighbouring lands, and we have considered the arguments addressed to us on this point by Counsel, but it is not, we think, necessary to examine that evidence again in detail. It is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of this land in reference. Differences small or great exist in various conditions, and what precise allowance should be made for these differences is not a matter which can be reduced to any hard and fast law. It will suffice, therefore, for us to say that upon a general consideration of all the circumstances which have been adduced, we are of opinion that the neighbouring sales afford ample support for the view which the Tribunal ultimately took.

Only one point remains to be noticed and that is as to the allowance of Rs. 1,330 for damages under—as the judgment goes—sub-section 3 of section 23 of the Land Acquisition Act. After reference to the President of the Tribunal and upon consideration of the general language of the judgment, we are satisfied that sub-section 3 was misquoted for sub-section 4, and that the damages given were given not on account of severance as such, but by reason of the acquisition having injuriously affected the claimant's other property. Of this injury there is, we think, sufficient evidence in the deposition of witness Raghunath and in the map itself, Exhibit Q. And nothing has been said which would justify us in reducing the sum which the Tribunal has awarded upon this head.

The result therefore is that this appeal must be dismissed with costs.

Appeal dismissed.

R. R.

CRIMINAL REVISION.

Before Chief Justice Scott and Mr. Justice Knight.

EMPEROR *v.* BHAUSING DHUMALSING.*

1908. *July* 7.

Criminal Procedure Code (Act V of 1898), sec. 106 (3)—Order to furnish security—Order can be passed by the appeal Court—Jurisdiction of the appeal Court.

Section 106, clause 3, of the Criminal Procedure Code (Act V of 1898) makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The word "also" in the clause plainly implies that the order may be independently made by those Courts as well as by the original Courts in the first clause; and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority.

Mahmudi Sheikh v. *Aji Sheikh*(1); *Muthiah Chetti* v. *Emperor*(2) and *Paramasiva Pillai* v. *Emperor*(3), dissented from.

Dorasami Naidu v. *Emperor*(4), referred to with approval.

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898), from an order passed by E. G. Turner, Magistrate, First Class, of Yeola.

The accused with eight others was tried by the Second Class Magistrate of Yeola for rioting and causing hurt, offences punishable under sections 147, 323 and 325 of the Indian Penal Code (Act XLV of 1860). The Magistrate convicted the accused of offences under sections 174 and 323, and sentenced him to undergo simple imprisonment for 15 days.

On appeal, the First Class Magistrate of Yeola altered the conviction to one under section 323 of the Indian Penal Code, reduced the sentence to simple imprisonment for five days, and ordered the accused, under section 106 of the Criminal Procedure Code (Act V of 1898), to execute a bond of Rs. 100 with one surety in like amount to keep the peace for one year.

The accused applied to the High Court.

M. V. Bhat, for the applicant.

* Criminal Application for Revision No. 84 of 1908.

(1) (1894) 21 Cal. 622.
(2) (1905) 29 Mad. 190.
(3) (1906) 30 Mad. 48.
(4) (1906) 30 Mad. 182.

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EMPEROR v. BHAUSING.

The Government Pleader for the Crown.

SCOTT, C. J. :—The petitioner, with eight other persons, was charged with rioting and causing hurt to the complainant under sections 147, 323 and 325 of the Indian Penal Code, in the Court of the Second Class Magistrate of Yeola, and was convicted under sections 147 and 325 of the Code and sentenced to simple imprisonment for fifteen days.

The petitioner then appealed to the First Class Magistrate, who altered the conviction to one under section 323 and reduced the sentence to five days' simple imprisonment and under section 106 of the Criminal Procedure Code directed that the appellant should execute a bond of Rs. 100 to keep the peace for one year.

The petitioner now applies to us in revision to set aside the order for execution of a bond contending that the Court had no jurisdiction to add such an order to the sentence of the Second Class Magistrate.

We cannot accept that contention. Section 106 of the Criminal Procedure Code authorises such an order whenever any person is convicted of an assault by the Court of a Magistrate of the First Class and such Court is of opinion that it is necessary to require the execution of such a bond. Both conditions are fulfilled in the present case, for the order of conviction under section 323 was passed by the First Class Magistrate and his opinion was that the bond was necessary.

It has however been contended that such an order cannot be made in appeal and in support of that contention the following cases have been cited: *Mahmudi Sheikh* v. *Aji Sheikh*[1]; *Muthiah Chetti* v. *Emperor*[2] and *Paramasiva Pillai* v. *Emperor*[3].

We are not prepared to accept the construction placed upon section 106 in those cases. We think that clause 3 makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The clause runs :—"An order under this section may *also* be

(1) (1894) 21 Cal. 622. (2) (1905) 29 Mad. 190.
(3) (1906) 30 Mad. 48.

made by an appellate Court or by the High Court when exercising its powers of revision," the "*also*" plainly implying that it may be independently made by those Courts as well as by the original Courts specified in the first clause; and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority. In support of this view we may refer to the judgment reported in the case of *Dorasami Naidu* v. *Emperor*[1], which throws doubt upon the correctness of the decisions above mentioned. We may say that we entirely concur in the reasoning of the latter part of that judgment.

For these reasons we dismiss the application.

R. R.

(1) (1906) 30 Mad. 182.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

NATHU PIRAJI MARWADI (ORIGINAL PLAINTIFF), APPELLANT, *v.* UMEDMAL GADUMAL (ORIGINAL DEFENDANT), RESPONDENT.*

1908. *July* 22.

Practice—Allegations by parties at trial—Case determined on those allegations—Making a new case in appeal.

A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, reversing the decree passed by B. R. Mehendale, Joint Subordinate Judge at Násik.

Suit for declaration that defendant was not entitled to possession of land.

The land belonged originally to one Piraji Márwádi, who died leaving a widow Gangabai. In 1887 Gangabai sold the property to one Dewrao, who sold it to Balvantrao in 1893. Balvantrao in 1893 and 1895 mortgaged it to Gadumal, the defendant.

Meanwhile, Nathu Piraji was adopted by Gangabai in 1884.

* Second Appeal No. 227 of 1907.

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NATHU PIRAJI v. UMEDMAL GADUMAL.

In 1897, Nathu Piraji (plaintiff) sued Balvantrao to recover possession of the property. Gadumal was not a party to that litigation. Nathu Piraji got a decree in 1903 against Balvantrao, in attempting to execute which he was obstructed by Gadumal. Nathu Piraji filed this suit to recover possession from Gadumal, alleging that the property was his ancestral property.

The defendant denied that he was bound by the former proceedings; and contended that his equitable right to retain possession had matured, and that the debt due to the defendant must be paid off before plaintiff could recover.

The Subordinate Judge held that the mortgage was proved, that the defendant was not barred by the former suit, that the claim was not barred, and that the plaintiff was entitled to recover possession with mesne profits for the period he had been dispossessed by defendant.

On appeal, the District Judge remanded the case to the Subordinate Judge for the determination of the following issues:—

1. "Was the sale by Gangabai to Dewrao invalid as against the present plaintiff?

2. If not, what is due on the mortgage?"

The Court on remand found the first issue in the negative and found that Rs. 7,266 were due.

These findings were certified to the District Judge who reversed the decree and dismissed the suit, on grounds which were expressed as follows:—

"From the facts of the present case and from the position of the parties it is clear that what was required was that the plaintiff should show that he was the adopted son of Piraji and that the property in suit was part of Piraji's estate and that it was part of the estate dealt with by the guardianship order of 1885. Until these facts were made out the case of the plaintiff against the present defendant was not in my opinion established. It did not occur to me that anything more than the merest formal proof of these facts would be necessary or indeed that they would be seriously contradicted and my sole reason for remanding the case was that there might be some proof of these points which the lower Court had in my opinion wrongly held to be proved by the judgments in the cases between the present plaintiff on the one hand and Dewrao and Balvantrao on the other. No such formal proof has however been adduced and accordingly it is not shown that plaintiff was the adopted son of Piraji, and that the property in suit could not be dealt with effectively by Gangabai. . .

In the absence of any evidence I must hold that plaintiff has not shown that he is entitled to recover from the present defendant. But I note that assuming the judgments referred to, to be admissible as proving the status of plaintiff, I should hold on them that Nathu was the adopted son of Piraji, that the property in suit was dealt with by the guardianship order and that Gangabai's alienation to Dewrao and consequently the subsequent transfer to the present defendant were ineffective, and that accordingly the plaintiff is entitled to recover.

Meanwhile I must reverse the order of the lower Court and dismiss the suit with costs."

The plaintiff appealed to the High Court.

Inverarity, with *R. R. Desai*, for the appellant.

Robertson, with *S. S. Patkar*, for the respondent.

BATCHELOR, J.:—The first question raised in this appeal turns upon the manner in which the case was dealt with by the lower appellate Court, and to appreciate the point, it will be necessary to refer to the pleadings and issues.

The suit was one to obtain possession of certain land, and in the first paragraph of the plaint, the property is claimed by the plaintiff as being his ancestral property. Reference is then made to certain proceedings in a previous litigation before the High Court to which it was said that the defendant had been a party.

The defendant's written statement contains nine paragraphs which traverse various allegations made in the plaint. But upon a fair reading of this written statement, we do not find that the ownership of the plaintiff is anywhere contested. It is true that there is a reference to the High Court proceedings in the appeal of 1902, but that reference, we think, was merely to rebut an inference which the plaint had suggested that these earlier proceedings were binding upon the defendant, in the matter of the validity of the alienation. This view is supported by the fifth paragraph of the written statement in which the defendant's case is put upon adverse possession, and it is admitted that the lands in suit were formerly in the plaintiff's family.

Turning to the issues, we find that there is no issue which clearly raises the question of title, and that was the opinion formed of the pleadings and issues by the learned Subordinate Judge who tried the case in the first instance. We think, therefore, that no question of title was ever raised in the first Court.

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When the case came before the District Judge on appeal, the District Judge remanded it for decision on this issue:—

Was the sale by Gangabai to Dewrao invalid as against the present plaintiff?

Now that was an issue raising a point which had never been raised before, and of which the plaintiff had consequently no notice. But the matter unfortunately does not rest there, for, when the Court of first instance makes its return to this order of remand, the District Judge proceeds to discuss and interpret his order in a particular manner, which, we think, must have taken the parties by surprise. It was, he says, the object of this issue to raise the questions whether the plaintiff was the adopted son of Piraji, whether the property in suit was part of Piraji's estate and whether it was part of estate dealt with by the guardianship certificate. All these are points which no doubt might have been taken in defence but which never had been taken and should, therefore, not have been allowed to be raised at the final stage of the appeal. We do not think that the District Judge was justified in exposing the plaintiff after he had obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit. A litigating party can only succeed *secundum allegata et probata*, and the Court should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

It was endeavoured then to support the decree upon the point of limitation. But here we have the concurrent findings of both the Courts that the mortgagee's possession was not continuous for twelve years, but had suffered an interruption for at least two years.

The result, therefore, is that the decree of the District Judge must be reversed and the decree of the Subordinate Judge restored, and the plaintiff must have his costs throughout.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Heaton.

SHIVRAM DHONDU PUJARA (ORIGINAL DEFENDANT 14), APPELLANT, *v.* SAKHARAM KRISHNA KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.* 1908. *July* 30.

Hindu Law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), sections 234, 244, 252—Limitation Act (XV of 1877), Schedule II, Article 179.

A money decree obtained against the father of an undivided Hindu family governed by the Mitakshara law can be executed after his death against his sons to the extent of the ancestral property that has come to their hands even if the debt has been incurred for the sole purposes of the father provided that it is not tainted with immorality or illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under section 244 of the Civil Procedure Code (Act XIV of 1882).

Umed Hathising v. *Goman Bhaiji*(1), followed.

There is no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree. All questions between them and the decree-holder relating to execution must alike be disposed of under section 244 of the Civil Procedure Code (Act XIV of 1882).

Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties.

SECOND appeal from the decision of J. D. Dikshit, Assistant Judge of Ratnagiri, confirming the order of K. K. Sunavala, Subordinate Judge of Malvan, in an execution proceeding.

The plaintiff brought a suit against one Dhondu Lala, his two brothers and other co-sharers, for the recovery of Rs. 1,275-5-6

* Second Appeal No. 222 of 1908.

(1) (1895) 20 Bom. 385.

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due under two money bonds executed by Dhondu Lala alone. The plaintiff wanted a decree against all the defendants alleging that Dhondu was the manager of the family and that the debt was contracted by him for the joint purposes of the whole family. At an early stage of the suit Dhondu Lala died and his sons were brought on the record as defendants 13, 14 and 15. The Court, on the 31st March 1903, gave a decree to the plaintiff against the assets of Dhondu Lala and dismissed the suit against the other defendants. The plaintiff appealed against that part of the decree which dismissed the suit against the other co-parceners. But his appeal was dismissed. Dhondu Lala's representatives, defendants 13, 14 and 15 did not appeal against the decree against the assets of the deceased. The plaintiff having in the year 1906, that is, within three years of the date of the appellate decree and more than three years after the date of the first decree, presented a darkhast for the execution of the decree, defendant 14 contended that Dhondu Lala and defendants 13, 14 and 15 were joint and that the said defendants being the survivors were the sole owners of the property. He further contended that the darkhast was time-barred.

The Subordinate Judge found that the darkhast was in time, that the decree-holder was entitled to execute his decree against the interest of Dhondu Lala in the properties mentioned in the darkhast, that the said interest included the shares of defendants 13, 14 and 15 and that the decretal debt was of such a nature that the said defendants were bound to pay it. He, therefore, ordered that execution should proceed according to the darkhast.

Against the said order defendant 14 appealed and the Assistant Judge confirmed the decree.

Defendant 14 preferred a second appeal.

M. R. Bodas, for the appellant (defendant 14):—Our father who was defendant 1 died before decree and we and our brothers were brought on the record as legal representatives of the deceased. As the decree was passed against the estate of our father, the execution of the decree cannot now proceed against us. At the

time the decree was passed our father had no subsisting interest as it had already passed to us by survivorship.

Next, the plaintiff applied for execution more than three years after the decree of the Court of first instance. The application was therefore not within time. It was an error to compute the period of limitation from the date of the appellate decree to which we were not a party. The parties to the appeal were the plaintiff and the other defendants. Therefore clause 2 of the third column of article 179, schedule II of the Limitation Act cannot apply.

K. N. Koyaji, for the respondent (plaintiff):—The liability of the sons in execution proceedings is settled by the ruling in *Umed Hathising* v. *Goman Bhaiji* (1).

[SCOTT, C. J. referred to *Amar Chandra Kundu* v. *Sebak Chand Chowdhury* (2).]

That decision entirely supports our case. The liability of the sons taking ancestral property by survivorship can be determined in execution proceedings. A separate suit for the purpose is not necessary and such a suit will not lie.

As to limitation the plain words of clause 2 of the third column of article 179, schedule II of the Limitation Act must be strictly followed. That is now the settled rule of the three High Courts in India: *Lakshman Ramchandra* v. *Satyabhamabai* (3), *Kanti Chunder Goswami* v. *Bisheswar Goswami* (4), *Kristnama Chariar* v. *Mangammal* (5). In *Mashiat-Un-Nissa* v. *Rani* (6), two of the five Judges held the same view, and the case was distinguishable in some respects as pointed out in *Kanti Chunder Goswami* v. *Bisheswar Goswami* (4).

SCOTT, C. J.—The opponents in these execution proceedings are Hindus governed by the Mitakshara law. The original first defendant, their father, died before decree. On his death the opponents were placed on the record as defendants as his legal

(1) (1895) 20 Bom. 385.
(2) (1907) 34 Cal. 642.
(3) (1877) 2 Bom 491.
(4) (1898) 25 Cal. 585.
(5) (1902) 26 Mad. 91.
(6) (1889) 13 All. 1.

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representatives. The plaintiff has obtained a simple money decree against them as such legal representatives for Rs. 1,271-5-6 and costs to be recovered from the estate of the deceased. He has attached various properties mentioned in the application for execution which with a few trifling exceptions are ancestral properties which devolved exclusively upon the opponents by right of survivorship on their father's death. They claim that the ancestral properties formed no part of the estate of their father at the date of the decree and consequently are not liable to attachment. It is no doubt correct that at the date of decree the properties in question formed no part of the estate of the deceased. It has however been decided by this Court in *Umed Hathising* v. *Goman Bhaiji*[1], that a money decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property that has come into their hands even if the debt has been incurred for the sole purposes of the father provided that it is not tainted with immorality and illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality he can do so under section 244 of the Civil Procedure Code. That was a case in which the decree was sought to be executed against the son as legal representative under section 234 of the Code. The present is a case in which execution is sought against the sons added as legal representatives before decree, a situation dealt with in section 252.

There is however no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree under section 234. All questions between them and the decree-holder relating to execution must alike be disposed of under section 244. We, therefore, must follow the decision above referred to and we hold that it was open to the opponents to dispute in this proceeding the liability of the ancestral properties for the debt of their father on the ground that the debt was tainted with immorality

(1) (1895) 20 Bom. 385.

or illegality. They cannot insist on the plaintiff resorting to a fresh suit to enforce their pious obligation as Hindu sons to satisfy the debt out of these properties because the question having arisen in execution proceedings between the decree-holder and themselves as parties to the suit, a separate suit is rendered inadmissible by the provisions of section 244.

As the opponents have not impeached their father's debt on the ground either of immorality or illegality the decree-holder is entitled to execute his decree against all the attached properties unless his right to do so is, as contended by the opponents, barred by the law of Limitation under Article 179 of the 2nd schedule to the Limitation Act. It is contended on their behalf that the words of clause 2 in the third column of that article should not be taken literally and that as the opponents did not appeal against the original decree, although other defendants did, the date of the final decree of the appellate Court which was passed within three years from the initiation of these proceedings is a date which does not concern the opponents as the original decree which was final so far as they were concerned was passed more than three years before. We, however, are not disposed thus to disregard the plain words of clause 2. There was an appeal and the final decree of the appellate Court was passed less than three years before plaintiff's application. That application is therefore within time. We confirm the judgment of the lower Court and dismiss the appeal with costs.

Decree confirmed.

C. P. R.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Chandavarkar.

1908.
August 14.

RANU BIN SHIVJI BARATE (ORIGINAL DEFENDANT 5), APPELLANT, *v.* LAXMANRAO KRISHNA LIMAYE AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 1).*

Transfer of Property Act (IV of 1882), section 59—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 63 (A) (1)*—Mortgage-deed—Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him.*

A deed of mortgage was signed by the Sub-Registrar who was bound to attest it under the provisions of section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and the writer of the deed in concluding the writing of the body of the document stated that it was written by him. The deed was not attested by two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882).

Held, that neither the signature of the Sub-Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage.

An attesting witness is a "witness who has seen the deed executed and who signs it as a witness."

Burdett v. *Spilsbury*(2), followed.

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* Second Appeal No. 42 of 1908.

(1) Section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

63A. Mode of execution by agriculturists of instruments required to be registered under Act III of 1877.—(1) When an agriculturist intends to execute any instrument required by section 17 of the Indian Registration Act, 1877, to be registered under that Act, he shall appear before the Sub-Registrar within whose sub-district the whole or some portion of the property to which the instrument is to relate is situate and the Sub-Registrar shall write the instrument, or cause it to be written, and require it to be executed, and attest it, and, if the executant is unable to read the instrument, cause it to be further attested, and otherwise act in accordance with the procedure prescribed for a Village Registrar by sections 57 and 59 of this Act, and shall then register the instrument in accordance with the provisions of the Indian Registration Act, 1877.

(2) An instrument to which sub-section (1) applies shall not be effectual for any purpose referred to in section 49 of the Act last mentioned unless it has been written, executed and attested in the manner provided in that sub-section.

(2) (1843) 10 C. & F. 340.

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SECOND appeal from the decision of R. D. Nagarkar, Joint First Class Subordinate Judge of Poona, with appellate powers, reversing the decree of T. N. Sanjana, Second Class Subordinate Judge of Haveli at Poona.

Suit for a declaration that a certain deed was a valid mortgage or charge upon property.

The plaintiff alleged that the property in suit was mortgaged to him by defendants 2, 3 and 4 to secure repayment of Rs. 1,400 at 10 per cent. under a deed dated the 8th September 1893, and that Rs. 2,800 were due to him under the said deed on the date of the suit; that in execution of a decree obtained by defendant 1 the mortgaged property was attached; that the plaintiff thereupon presented an application praying that the attached property be sold subject to his mortgage encumbrance, but the Court dismissed the application on the 17th August 1904, holding that the mortgage-deed, not having been attested by at least two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882), was invalid and ineffectual to create a mortgage or a charge. The plaintiff, therefore, brought the present suit for a declaration that the mortgage-deed effected a valid mortgage or charge upon the property and that he was entitled to hold the property as security for the payment of the amount due thereunder.

Defendant 1 denied the plaintiff's mortgage or his charge upon the property and contended, *inter alia*, that the document relied on by the plaintiff was illegal, without consideration, invalid and ineffectual.

Defendants 2, 3 and 4 were absent.

Defendant 5, the execution purchaser who was joined as co-defendant after the institution of the suit, raised substantially the same defence as defendant 1.

The Subordinate Judge found that the mortgage-bond sued on was not proved according to law and it could not be used as evidence and that it was not effectual to create a valid mortgage of the property described therein, and failing to operate as a mortgage, it could not be used as creating a charge. The

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Subordinate Judge, therefore, dismissed the suit observing as follows :—

The mortgage-deed (exhibit 31) has been written under the provisions of the Dekkhan Agriculturists' Relief Act. The writer thereof (exhibit 30) swears that the defendant Govind Rangnath signed it for himself and as the Mukhtyar of the defendant Balkrishna Rangnath and that the defendant Waman signed it himself in his presence. The bond bears no attestation excepting that of the Sub-Registrar. The Sub-Registrar has been examined on commission (exhibit 39), but he simply admits the attestation and his other signatures on the bond to be in his handwriting. But he was not put a single question regarding execution and his evidence does not prove execution. Section 68 of the Evidence Act provides : " If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called *for the purpose of proving its execution*, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence." In this case the document being a mortgage-deed is required by section 59 of the Transfer of Property Act to be attested by at least two witnesses. It has been attested by one witness only, *viz.*, the Sub-Registrar, but although his evidence has been given, it has not been given for the purpose of proving the execution of the document. Consequently under section 68 of the Evidence Act, the document cannot be used as evidence of the mortgage transaction which can be effected by an attested document only. I cannot therefore hold the execution of the document as a mortgage-bond proved.

Even holding it proved, I find that the deed, having been passed after the Transfer of Property Act was extended to this Presidency, is invalid and ineffectual to create a mortgage not having been attested by at least two witnesses as required by section 59 of the Transfer of Property Act. The learned pleader for the plaintiff contends that the deed was executed under section 63A of the Dekkhan Agriculturists' Relief Act which requires the document to be attested by the Registrar alone which has been done in this case ; that it is only when the executant is unable to read the instrument that this section requires the document to be further attested and that in this case the executants knew to read and write and so further attestation was unnecessary. I think the argument is not correct. Beyond doubt the document has been properly executed in accordance with the provisions of the section 63A of the Dekkhan Agriculturists' Relief Act, but the question is whether that is sufficient to effect a valid mortgage. Section 63A of the Dekkhan Agriculturists' Relief Act does not provide how a transfer of property, such as mortgage, can be effected. That is provided by section 59 of the Transfer of Property Act. The above section of the Dekkhan Agriculturists' Relief Act simply prescribes the mode in which documents by agriculturists should be executed. That mode applies to all documents to be executed by agriculturists whether required by law to be attested or not. To ensure the genuineness of a document and to further pr-

vent any fraud being committed against an agriculturist, it requires all documents to be executed by agriculturists whether required by law to be attested or not to be attested by the Sub-Registrar and where the executant is illiterate to be further attested by other persons. It does not in any way affect the requisites prescribed by section 59 of the Transfer of Property Act for effecting a valid mortgage. A valid mortgage for Rs. 100 and upwards could only be effected under the above section by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the mortgagor is an agriculturist the further precautions laid down in section 63A of the Dekkhan Agriculturists' Relief Act have to be followed and the document has to be written by or under the superintendence of the Sub-Registrar and to be attested by him. That does not do away with the necessity of two attestations required by section 59 of the Transfer of Property Act to effect the mortgage itself. I therefore find that the document relied on by the plaintiff is invalid and ineffectual to create a valid mortgage; nor can the failure to comply with the provision for attestation contained in section 59 of the Transfer of Property Act convert a mortgage transaction into a charge (see *Narayan Babaji* v. *Lakshmandas*, 7 Bombay Law Reporter, p. 934). The plaintiff's suit must therefore be dismissed.

On appeal by the plaintiff the Subordinate Judge's decree was reversed and the suit was allowed on the following grounds :—

The lower Court thinks that the mortgage-deed (exhibit 31) is a document which is required by law to be attested (section 59 of the Transfer of Property Act) and that therefore it cannot be used as evidence until one attesting witness at least has been called for the purpose of proving its execution (section 68 of the Evidence Act). The writer of the deed (exhibit 30) was called as a witness for the purpose of proving its execution and has deposed to its execution by the obligors. The only question is whether he can be treated as an attesting witness. "The evidence of the writer of the deed, who has signed his name, though not explicitly as an attesting witness, on the margin, and has been present when the deed was executed, is admissible under this section (section 59) of the Transfer of Property Act, as of an attesting witness." (Gour's Transfer of Property Act, second edition, vol. II, p. 605). This remark is based upon *Radha Kisen* v. *Fateh Ali*, I. L. R. 20 All. 532 and other cases given in the footnote No. 6 on page 605. In the present case the writer has signed his name on the deed and according to his evidence he was present when the deed was executed. His evidence is therefore admissible as of an attesting witness and the provisions of section 68 of the Evidence Act are sufficiently complied with.

In the next place it is possible to treat the evidence of the Sub-Registrar (exhibit 39) as proving execution. He states on oath on reading the endorsement on the mortgage-bond (exhibit 31) that it was registered according to the provisions of the Dekkhan Agriculturists' Relief Act. Section 63A of the Act requires him to attest a document like the mortgage-deed (exhibit 31) and he

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has further admitted on oath his five signatures on the document. The first endorsement at the foot of the document, which is signed by him in his official capacity, shows that he saw the executants sign the document. Though no direct question was asked to him, as to the fact of execution by the obligors, the effect of his evidence, in my opinion, is that he proves execution by the obligors. Even assuming that that is not its effect, the document is, I think, sufficiently proved by the evidence of the writer (exhibit 30), which can be treated as the evidence of an attesting witness for the purposes of section 68 of the Evidence Act.

Defendant 5 preferred a second appeal.

D. A. Khare, for the appellant (defendant 5).

G. S. Rao, for respondent 1 (plaintiff).

N. M. Patvardhan for respondent 2 (defendant 1).

SCOTT, C. J.—The deed upon which the plaintiff relies being a mortgage-deed to secure repayment of Rs. 1,400 must, in order to be effective, be attested by two witnesses (see section 59 of the Transfer of Property Act). Assuming that we may take the signature of the Sub-Registrar who was bound to attest under the provisions of section 63A of the Dekkhan Agriculturists' Relief Act as that of an attesting witness, there is no one else whose name appears on the document who purports to sign as an attesting witness. But it is argued that the writer of the deed who, in concluding the writing of the body of the document, states that it is written by him, can be treated as an attesting witness. It was not suggested in the first Court that he could be regarded in this light, but the appellate Court relying upon a passage in Gour's Transfer of Property Act and upon the case of *Radha Kishen* v. *Fateh Ali Ram*[1], has held that his evidence was admissible as that of an attesting witness and that the provisions of section 68 of the Evidence Act had been sufficiently complied with. We cannot gather from the report in *Radha Kishen* v. *Fateh Ali Ram*[1] in what manner or place the scribe in that case affixed his name to the deed; we are however of opinion that the name of the writer in the case now before us cannot be held to be an attestation. It occurs before the names of the executing parties and forms part of the body of the document. In *Burdett* v. *Spilsbury*[2] Lord Campbell said:

(1) (1893) 20 All. 532.

(2) (1843) 10 C. & F. 340 at p. 417.

"What is the meaning of an attesting witness to a deed? Why it is a witness who has seen the deed executed, and who signs it as a witness." This, we think, is the meaning of attesting witness in section 68 of the Evidence Act and we therefore hold that the writer in the circumstances of this case cannot be treated as an attesting witness.

It has, however, been argued that the Dekkhan Agriculturists' Relief Act is a special enactment which is not affected by the Transfer of Property Act and that the latter Act has no application to this case. The answer to this argument is given by the Subordinate Judge in the original Court. He says: "Beyond doubt the document has been properly executed in accordance with the provisions of section 63A of the Dekkhan Agriculturists' Relief Act, but the question is whether that is sufficient to effect a valid mortgage. Section 63A of the Dekkhan Agriculturists' Relief Act does not provide how a transfer of property such as a mortgage can be effected. That is provided by section 59 of the Transfer of Property Act. The above section of the Dekkhan Agriculturists' Relief Act simply prescribes the mode in which documents by agriculturists should be executed. That mode applies to all documents to be executed by agriculturists whether required by the law to be attested or not ... It does not in any way affect the requisites prescribed by section 59 of the Transfer of Property Act for effecting a valid mortgage."

We allow the appeal. We set aside the decree and dismiss the suit with costs throughout on the plaintiff. Separate sets of costs between the appellant (defendant No. 5) and defendant No. 1.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

1908. *July* 31.

DATTATRAYA WAMAN TILLU (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* RUKHMABAI KOM PANDURANG DAMODUR TILLU (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu widow—Maintenance—Widow having her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Premature suit.

The plaintiff, a Hindu widow, filed a suit to recover arrears of maintenance and to obtain a declaration of her right to maintenance. At the time the suit was brought, she was found to be in possession of a fund belonging to her husband's family estate, which sum was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court.

Held, that no cause of action had accrued to the plaintiff. At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge, A. P., at Thana, reversing the decree passed by M. H. Wagle, Subordinate Judge at Alibag.

Suit for a declaration to recover maintenance and for arrears of maintenance.

The plaintiff's husband Pandurang and his brother Waman (father of defendants) formed a joint family. Pandurang died in March 1897; and Waman died on the 25th November 1900.

Soon after Pandurang's death, his widow Rukhmabai drew Rs. 937-3-7, which were deposited in her husband's name in the Postal Savings Bank.

The present suit was brought on the 9th February 1904 to obtain a declaration that the plaintiff was entitled to get from the family estate, in the hands of the defendant, maintenance at the rate of Rs. 120 a year, and for Rs. 360 being the amount of the arrears of three years' maintenance.

The defendants contended *inter alia* that the income of the money she had withdrawn from the Savings Bank was enough to support her, and that she was entitled to Rs. 6 a month for maintenance.

* Second Appeal No. 368 of 1907.

The Subordinate Judge held that Rs. 6 per month were sufficient for plaintiff's maintenance, but that her suit was premature. His reasons were as follows :—

"The plaintiff admits that she withdrew the amount of Rs. 937-3-7 from her husband's account in the Post Office Savings Bank. . . . Assuming that it was the plaintiff's husband's property she cannot sue for maintenance, so long as she has that money in her hand (*Bai Kanku* v. *Bai Parvati*, P. J. 1890, 182). In her deposition taken on commission the plaintiff has stated that she paid to her brother Rs. 300 as the fooding charges for five years. The deposition was taken in February 1905, and the suit was filed on the 9th February 1904. If the plaintiff had money to pay the boarding charges for five years, what was the necessity of claiming arrears of maintenance? If no arrears could be claimed, and if she had money that would last her for some time more, she had no cause of action. She does not say that she got the money after the institution of the suit. She has given an account of how she spent the balance of the money. She says that she spent some money for the expenses of this suit, yet she has claimed the costs of the suit. If she had money to spend on the suit, why did she not apply the same for maintenance? The other alleged expenditure is unjustifiable. She cannot spend her husband's money in any way she pleases and then ask for maintenance from the family property; or rather she cannot claim maintenance while she has her husband's money in her hands. The suit is therefore brought without any cause, and hence it must be held to be premature."

On appeal, the lower appellate Court held that the plaintiff should be awarded maintenance at Rs. 100 a year, and that though she had withdrawn Rs. 937-3-7 from the Savings Bank, and that though the present suit was not therefore premature or unsustainable, yet the amount together with its interest should be taken into consideration and first applied towards the maintenance expenses of the plaintiffs, and that the balance, if any, should be returned to defendant No. 1. The decree passed was that the plaintiff was declared entitled to a maintenance allowance of Rs. 8-5-4 a month, that her claim for arrears be dismissed, and that she should pay Rs. 184 to defendant No. 1 and in default should not be allowed to recover her monthly allowance till the 9th January 1909.

The defendant No. 1 appealed to the High Court.

N. V. Gokhale, for the appellant.

P. P. Khare, for the respondent.

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BATCHELOR, J. :—This was a suit for maintenance brought by a Hindu widow. The Judge of first instance dismissed the suit on this among other grounds that it was premature. The learned Judge in the Court of Appeal differing from that view allowed the suit and gave the plaintiff a decree for maintenance at the rate of Rs. 100 a year.

The only question raised in this appeal is whether the cause of action had accrued to the plaintiff when this suit was filed in February 1904. At that time the findings of the Court show that the plaintiff was in possession of a fund belonging to her husband's family estate, which fund was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court. And in this state of the facts, we are of opinion that no cause of action had accrued to the plaintiff. In 1904 the Court was not in a position to forecast events or to anticipate the position of affairs five years later. In other words it was not in a position to make a decree for maintenance; and no liability to provide maintenance could in the then existing circumstances attach to the appellant.

It is urged that the Court might have made a mere declaratory decree affirming the plaintiff's abstract right to maintenance. But assuming that such an abstract prayer was competent, it was not a prayer put forward by the plaintiff; her prayer was for maintenance at the rate of Rs. 120 a year. We think, therefore, that the Subordinate Judge of first instance was right in the view which he took upon this point and we must reverse the decree under appeal and dismiss the suit with costs throughout.

We may add that Mr. Khare has attempted to enlist our sympathy in favour of his client. But upon that point we need only say that whatever the sympathies of the Court may be worth, they do not range themselves on the side of the plaintiff.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

TEHILRAM GIRDHARIDAS, PLAINTIFF AND APPELLANT, *v.* KASHIBAI, WIDOW, DEFENDANT AND RESPONDENT.*

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Transfer of Property Act (IV of 1882), section 55, clause (4) (b), clause (6) —Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Estoppel—Evidence Act (I of 1872), section 115.

In a registered sale-deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property,

Held, that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title-deeds.

Per BATCHELOR, *J.* :—A vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser.

ONE Mahomedali mortgaged to the plaintiff, by a registered deed dated 7th April 1904, a chawl for securing in trust for the person or persons who had accepted or discounted or would thereafter accept or discount at the plaintiff's request hundis, notes, etc., drawn or payable by the mortgagor for the aggregate sum not exceeding at any time the amount of Rs. 7,000.

The mortgagor handed to the plaintiff deeds and muniments of title relating to the said property including a registered deed of sale from the defendant to the mortgagor, dated 3rd April 1903. At the foot of this deed it was endorsed that the sum of

* Suit No. 422 of 1906 : Appeal No. 1506.

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Rs. 9,000 had been paid as consideration money by the mortgagor and received by the defendant in full.

The plaintiff demanded on the 12th May 1905 from the mortgagor the sum of Rs. 6,455-3-6 for principal, interest and costs due by him and in default of payment gave notice that the plaintiff would exercise the power of sale reserved to him. No answer having been received from the mortgagor the plaintiff caused the chawl to be put up for sale by auction to be held on the 16th September 1905.

On 13th September 1905 the defendant for the first time intimated to the plaintiff that Rs. 4,000 out of the consideration money still remained unpaid to her by the mortgagor and therefore called upon the plaintiff not to put up the said chawl for sale as the plaintiff's mortgage could not affect the defendant's rights and interests in the property.

The plaintiff alleged that he was a *bonâ fide* mortgagee for value without notice of the defendant's alleged lien and entitled to possession of the chawl under the mortgage-deed; and that as the defendant knowing that the amount of the purchase-money had not been received by her in full caused it to be falsely stated otherwise in the sale-deed and had also parted with all other title-deeds relating to the said chawl, she was estopped from setting up her lien if any.

The plaintiff prayed for a declaration that he was entitled to sell the chawl under the mortgage-deed free from any lien of the defendant; and for an order directing the defendant to deliver possession to the plaintiff of the said chawl including the four rooms therein in her personal occupation.

The defendant contended that the mortgage was a sham transaction; that the sale-deed was not explained to her; that the vendee (the mortgagor) by a writing of even date agreed to pay to her the balance of the purchase-money; that she was in possession of the chawl in exercise of her right of lien as unpaid vendor, and the plaintiff was aware of her possession, that she had obtained a High Court decree against the mortgagor for the amount of Rs. 3,444 due to her; that she was fraudulently induced to part with her title-deeds by the mortgagor alleging that they

were necessary for the preparation of the deed of sale; that the suit was bad in law as under the mortgage deed the plaintiff was appointed a trustee on behalf of an uncertain class and the plaintiff had not obtained the leave of the Court to sue on behalf of that class; that the mortgagor was a necessary party to the suit. The defendant by way of counterclaim sought for a declaration that she as unpaid vendor had a lien on the chawl for the balance of the purchase-money and that she was entitled to enforce her right by the sale of the said premises.

The Court (Macleod, J.) passed a decree in the defendant's favour and dismissed the suit with costs.

The plaintiff appealed.

Strangman (with *Raikes*) for the appellant.

Macleod, J., decided case on two points: (1) that the so-called mortgage was not a mortgage and the plaintiff did not take under the mortgage, (ii) that the plaintiff had notice of the defendant's lien for unpaid purchase-money. See mortgage deed which says "in respect of hundis, bills or advances made *through* him the said Multani Tehilram Girdharidas." On this Macleod, J., has held that plaintiff was only a volunteer and not a secured creditor. The learned Judge relied on *Wallwyn* v. *Coutts* [1] and *Garrard* v. *Lord Lauderdale* [2], but the facts in these two cases are different from those here. Plaintiff is himself interested in the mortgage deed and is also liable to others and is not a mere volunteer. See *Siggers* v. *Evans* [3]. "*Through him*" would include loans made by the plaintiff, the plaintiff guarantees the payment back of the loans.

The plaintiff had no notice of lien as required by Transfer of Property Act, section 55, cl. 4 (*b*). *Webb* v. *Macpherson* [4], which is relied on by them, is not applicable because the question of estoppel arises. See *Kennedy* v *Green* [5].

Macleod, J., has held that defendant's possession of the mortgaged property was in itself constructive notice to the plaintiff

(1) (1815) 3 Mer. 707.
(2) (1830) 3 Sim. 1.
(3) (1855) 5 El. & Bl. 367.
(4) (1903) L. R. 30 I. A. 238.
(5) (1834) 3 Myl. & K. 699.

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of defendant's claim. This is not so: see *White* v. *Wakefield*[1]. She might have been in possession as a tenant of the purchaser, possession in such a case would mean nothing. This story about notice is never set up in correspondence before we come to Court. See Lord Cain's judgment in *Shropshire Union Railways and Canal Company* v. *The Queen*[2].

Mirza (*Setalvad* with him) for the respondent.

The plaintiff is a trustee on behalf of the creditors. The assignee cannot stand in a better position than the assignor, none of the creditors of the mortgagors were privy to the mortgage deed: see *Johns* v. *James* [3].

On the question of notice we say the plaintiff had constructive notice of our lien: see Wigram, V. C., in *Jones* v. *Smith*[4], Alderson B. in *Whitbread* v. *Jordan* [5], *West* v. *Reid* [6], *Doorga Narain Sen* v. *Baney Madhub Mozoomdar* [7], *Gobind Chunder Mookerjee* v. *Doorgapersaud Baboo* [8].

Possession has the effect of notice: *Kondiba* v. *Nana* [9]. If there is notice no question of estoppel can arise.

Raikes in reply.

JENKINS, C. J.—On the 7th of April 1904 Mahomedali Abdul Husein Goriawalla executed in favour of the plaintiff a mortgage of immoveable property in Bombay, and the purpose of this suit is to restrain the defendant from interfering with the exercise by the plaintiff of the power of sale contained in the mortgage deed. The interference is admitted, and is sought to be justified by the defendant on the ground that she has a charge on the mortgaged property under section 55 (4) (*b*) of the Transfer of Property Act.

Macleod, J., has passed a decree in the defendant's favour and dismissed the suit with costs. The plaintiff now appeals from that decree. The charge claimed by the defendant is in respect of unpaid purchase money due under an instrument of transfer

(1) (1835) 7 Sim. 401.
(2) (1875) L. R. 7 H. L. 496 at p. 510.
(3) (1878) 8 Ch. D. 744.
(4) (1841) 1 Ha. 43.
(5) (1835) 1 Y. & Coll. 303 at p. 328.
(6) (1843) 2 Ha. 249.
(7) (1881) 7 Cal. 199.
(8) (1874) 22 W. R. (Civ. Rul.) 248.
(9) (1903) 27 Bom. 408.

executed by her in favour of Mahomedali, the plaintiff's mortgagor, on the 3rd of April 1903, whereby the ownership of the mortgaged property passed to Mahomedali as the buyer.

The actual consideration named in the instrument of transfer was Rs. 9,000, but of this only Rs. 4,000 was paid at the time. By an agreement of even date Mahomedali agreed to pay the balance within one year, and it was thereby provided as follows: "In case I" (that is Mahomedali) "or my heirs sell the said premises in question and mentioned in the said conveyance the said vendor should at once attach the sale-proceeds of the said premises and recover the balance out of it." A part of this balance is still unpaid.

The points urged by the defendant are, first, that she has a charge under section 55 of the Transfer of Property Act: secondly, that under the mortgage deed the plaintiff has no right to sell the property: and, thirdly, that if he has that right, it is subject to the charge in the defendant's favour.

I will first consider whether the plaintiff has a right to sell the property under the mortgage deed.

The circumstances that led up to the mortgage are indicated in the recitals, which run as follows:—

This indenture made the 7th day of April in the Christian year one thousand nine hundred and four between Mahomedali Abdul Husein Goriawalla of Bombay Vorah Mahomedan inhabitant of the one part and Multani Tahilram Girdharidas of Bombay Hindu inhabitant of the other part whereas the said Mahomedali Abdul Husein Goriawalla is seized of or otherwise well and sufficiently entitled to the hereditaments and premises hereinafter more particularly described and intended to be hereby granted for an estate of inheritance in fee simple in possession free from incumbrances and whereas the said Multani Tahilram Girdharidas is a broker and has been for some time past procuring loans of money from several persons to the said Mahomedali Abdul Husein Goriawalla hundis drawn or payable by him and other negotiable instruments and on personal security and whereas the said Multani Tahilram Girdharidas has up to the date of these presents procured various loans of money to him the said Mahomedali Abdul Husein Goriawalla from different persons some of which have been paid off by the said Mahomedali Abdul Husein Goriawalla and that a balance of Rs. 6,200 now remains due and owing by the said Mahomedali Abdul Husein Goriawalla on account thereof and whereas it has been agreed by and between the parties hereto that in consideration of the said

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Multani Tahilram Girdharidas procuring such loans from time to time which loans shall not in any case exceed in aggregate Rs. 7,000 at any time the said Mahomedali Abdul Husein Goriawalla should as a security for such loans execute a mortgage of the said hereditaments and premises for the said sum of Rs. 7,000 to the said Multani Tahilram Girdharidas for the use and benefit of the person or persons who have already been or may or shall hereafter be procured by him the said Multani Tahilram Girdharidas to make such loans to him the said Mahomedali Abdul Husein Goriawalla to the extent of the said sum and in manner hereinafter appearing now this Indenture witnesseth that in pursuance of the said agreement and consideration of the premises the said Mahomedali Abdul Husein Goriawalla doth hereby for himself his heirs executors and administrators covenant with the said Multani Tahilram Girdharidas his heirs executors administrators and assigns that he the said Mahomedali Abdul Husein Goriawalla his heirs executors or administrators will on demand made to him or them or left at the place of his or their business pay to the said Multani Tahilram Girdharidas his heirs executors administrators or assigns the balance which shall for the time being be owing by him the said Mahomedali Abdul Husein Goriawalla his heirs executors or administrators in respect of hundis bills notes or drafts accepted paid or discounted or loans or credits or advances made through him the said Multani Tahilram Girdharidas to or for the use or accommodation or at the request of the said Mahomedali Abdul Husein Goriawalla and for interest commission or otherwise in trust for the person or persons his or their heirs executors administrators and assigns who have hitherto accepted paid or discounted or may or shall hereafter accept pay or discount such hundis bills notes or drafts or who have made or may or shall thereafter make such loans credits or advances as aforesaid as his or their own proper moneys in proportion due to him or them respectively and to be assigned and disposed of as he or they shall direct.

Then Mahomedali covenanted to pay to the plaintiff the balance for the time being owing by him, Mahomedali, "in respect of hundis, bills, notes or drafts accepted, paid or discounted or loans or credits or advances made through him the said Multani Tahilram Girdharidas to or for the use or accommodation or at the request of the said Mahomedali Abdul Husein Goriawala and for interest, commission or otherwise in trust for the person or persons, his or their heirs, executors, administrators and assigns who have hitherto accepted, paid or discounted or may or shall hereafter accept, pay or discount such hundis, bills, notes or drafts or who have made or may or shall thereafter make such loans, credits or advances as aforesaid as his or their own proper moneys in proportion due to him or them respectively and to be assigned and disposed of as he or they shall direct."

The transfer of the property is expressed to be to the plaintiff "in trust for the person or persons his or their heirs, executors and assigns who have hitherto accepted or paid or discounted or may or shall hereafter accept or pay or discount the said hundis bills or notes or drafts or who have made or may or shall hereafter make the loans credits or advances through the said Multani Tahilram Girdharidas as aforesaid and whichever moneys shall for the time being remain due and owing in respect thereof."

And then the trusts of the sale-proceeds are expressed to be after payment of costs and expenses to pay and satisfy the money then owing on the security of the mortgage-deed.

The defendant contends that the deed is voluntary, and that there is no one who can claim the benefit of it.

The plaintiff on the other hand claims that he is entitled to the benefit of the security created by the mortgage-deed, and he makes out his claim as follows.

He says that at the institution of the suit there was, and that there still is, a sum of Rs. 5,700 with interest due on the security of the deed. This amount is made up of Rs. 3,700 and Rs. 2,000. The sum of Rs. 3,700 represents two notes for Rs. 2,500 and Rs. 1,200 and the sum of Rs. 2,000 represents two hundis for Rs. 1,000 apiece, all discounted through the plaintiff as contemplated by the mortgage-deed. These notes and hundis were not met by Mahomedali at maturity, and the holders were paid by the plaintiff, who took from Mahomedali promissory notes for the amounts paid by him.

But if the notes and hundis paid by the plaintiff come within the terms of the mortgage-deed, then the plaintiff can in my opinion claim the benefit of the security. The evidence shows that the notes and hundis were discounted on the plaintiff's assurance and the conclusion to which I come is that he guaranteed repayment. The notes and hundis have been produced by him and there can (in my opinion) be no doubt that he held them by way of security for the amount paid by him. Moreover, it appears that by the cancellation of the special

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endorsements two of these instruments are endorsed in blank and are so held by the plaintiff.

The conclusion to which I come is that the plaintiff on the payments made by him became entitled to the benefit of the security created by the mortgage-deed, and that by taking promissory notes from Mahomedali for the amounts paid by him he did not intend to abandon and in fact did not give up this security.

The learned Judge considered that *Wallwyn* v. *Coutts* (1) and *Garrard* v. *Lord Lauderdale* (2) furnished an answer to the plaintiff's claim, but in my opinion they do not in any way govern the present case, and it cannot be said that the mortgage-deed was a voluntary trust-deed. The recitals show what the consideration was: loans were procured by the plaintiff in accordance with what was contemplated, and one of those by whom money was paid has stated in evidence that the plaintiff told him that he had got a deed.

Moreover, the facts as to the Rs. 6,200 mentioned in the recitals show that the deed was not even in its inception voluntary. There can be no doubt that it was intended to secure this sum. But of this amount Rs. 3,400 had actually been paid at that date by the plaintiff in respect of hundis or notes on which Mahomedali was liable, and of this Mahomedali must have been aware inasmuch as he had given the plaintiff a note for the amount.

This also serves to show that it was the intention of the parties that the plaintiff was to have the benefit of the security for all amounts subsequently to be paid by him in discharge of Mahomedali's liability to those who had discounted notes or hundis for him through the plaintiff.

If the plaintiff is, as I hold, entitled to the benefit of the mortgage it is not disputed that the power of sale is exercisable, so it only remains for me to deal with the defendant's contention that the power can only be exercised subject to the charge in her favour in respect of unpaid purchase money.

(1) (1815) 3 Mer. 707.

(2) (1830) 3 Sim. 1.

Section 55 (4) (*b*), on which the defendant relies, is in these terms:—

"The seller is entitled—where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part."

Notwithstanding the difference between the language of this sub-section and that of sub-section 6, I will assume that the defendant, under section 55 (4) a seller, has a charge upon the property transferred not only in the hands of the buyer, but also of one who claims under the buyer, and that the decision in *Webb* v. *Macpherson*[1] did not turn on the special circumstances of that case.

But is not the defendant estopped from relying on the facts necessary to the establishment of her charge?

Section 115 of the Evidence Act provides that:

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

In the instrument of transfer of the 3rd of April 1903 executed by the defendant to Mahomedali it is stated that the consideration of Rs. 9,000 had been paid on or before the execution of the instrument, and endorsed on it was a receipt for this amount signed by the defendant, and the title-deeds in the defendant's possession were delivered to the buyer.

The plaintiff has sworn that if he had known the purchase-money of the property had not been fully paid up he would not have taken the mortgage, and in the mortgage it is recited that Mahomedali was seized of the property free from incumbrances.

Why then should not the defendant be estopped by the statement in the deed and the endorsement and her act of handing over the title-deeds?

(1) (1903) L. R. 30 I. A. 238 at p. 244; 5 Bom. L. R. 838.

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If the plaintiff knew the true facts then he would not be entitled to rely on section 115, but on the evidence I hold it is not proved that in fact he had such knowledge. In the correspondence before suit it is distinctly said that the first intimation to the plaintiff of the defendant's claim was her attorney's letter of the 13th of September 1905 (see letter of the 16th September 1905), and this statement was not questioned.

The plaintiff in his evidence by implication denies knowledge of non-payment of the purchase money, and the learned Judge does not find that he had this knowledge. All he does hold is that the defendant was aware of circumstances in connection with the defendant's claim which put him on inquiry before the mortgage was executed to ascertain whether Mahomedali was in possession or not, and that having made no inquiry of any sort he cannot now be said to be a mortgagee without notice of her claim. What these circumstances are does not appear from the judgment but all it comes to is that he ought to have made enquiries as to the mortgagor's possession, and failure in this respect deprives him of saying that he is a mortgagee without notice of her claim. It is argued that the learned Judge has found that the plaintiff had notice within the definition contained in section 3 of the Transfer of Property Act. But that does not appear from his judgment: the issue on which the defendant relies is the 20th, but that falls short of the requirements of the section, and I can discover nothing in any part of the judgment which amounts to a finding of actual knowledge, wilful abstention or gross negligence as required by section 3.

And on a consideration of the evidence I hold that no case within that section has been established, so that it is unnecessary to consider whether anything short of actual knowledge would disentitle the plaintiff from relying on section 115 of the Evidence Act.

Much reliance has been placed on the evidence of Moreshwar Yeshwant, N. F. Creado and Anandrao Ramchandra. Moreshwar's evidence is directed to showing that the plaintiff must have learnt of the claim on the 28th of February 1904, about five weeks before the execution of the mortgage.

One naturally asks how could he in September 1907 have remembered that the plaintiff was present at a conversation between him and Mahomedali on the 28th of February 1904 over three and half years before. The date was evidently obtained from the endorsement of payment, and the witness' version in examination-in-chief was that the plaintiff had found the money. If that had been true there would have been a reason for the witness' recollection of the circumstance. But the plaintiff denies the incident, and it was not suggested to him that he had made any entry of the Rs. 130 said to have been found by him on that occasion. Before us the plaintiff's books were produced for examination by the defendant's advisers with the result that no trace could be found in them of any such payment having been made. I do not believe that the Rs. 130 was found by the plaintiff, and that being so I am unable to attach any value to Moreshwar's story of the 28th of February.

Creado too speaks to this same day, but I am equally unable to believe his story. He is more cautious than Moreshwar, because he does not commit himself to the statement that the plaintiff found the money. But how he comes to remember the plaintiff's presence on that occasion I cannot understand and it would not be safe to rely on his evidence for the purpose of bringing home to the plaintiff knowledge that the purchase money had not been paid.

Anandrao's evidence, if it means anything, means that the plaintiff had actual knowledge, a comment which applies to the evidence of the two witnesses I have already discussed. But it is clear that the learned Judge did not believe actual knowledge was brought home to the plaintiff; the furthest he goes is to hold that the plaintiff was aware of circumstances in connection with Kashibai's claim which put him on inquiry to ascertain whether Mahomedali was in possession or not, and that having made no inquiry of any sort he cannot now be said to be a mortgagee without notice of the claim. This appears to me to mean that he ought to have made enquiry, and if he had done so, then he would have had actual knowledge. I think the learned Judge went to the furthest limit possible, and I certainly will go no further; for Anandrao's evidence as well as that of

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Moreshwar and Creado fails to convince me that the plaintiff knew that the facts stated in the receipt and implied by delivery of the title-deeds were untrue.

No reliance has been placed on the other evidence of knowledge which has been disbelieved by Macleod J.; therefore, I need not discuss it.

Then Mr. Mirza has urged on behalf of the defendant that the learned Judge has found against estoppel; and we, therefore, ought not to disturb his finding.

The issue framed on this point is "whether the allegations in para. 7 of the plaint are true." The case of estoppel is made in that para. and the finding of the learned Judge is in the negative. But nowhere does he discuss the matters to which I have referred and I am unable to see that he has come to any definite finding on the facts necessary to the determination of this question.

The conclusion to which I come is that the defendant by her declarations as to receipt of the whole purchase-money and her act in delivering to the buyer the title-deeds intentionally caused the plaintiff to believe it to be true as recited in the mortgage that Mahomedali was seized of the property in fee simple in possession free from incumbrances so far as she was concerned, and that the plaintiff acted on that belief.

It follows, therefore, that the defendant cannot be allowed in this suit to deny the truth of this.

The decree of the first Court must, therefore, be reversed and a decree must be passed making a declaration in the terms of prayer (*a*) to the plaint, granting an injunction restraining the defendant from asserting, continuing or insisting on her objection so as to prejudice the exercise by the plaintiff of his power of sale and from interfering with the plaintiff's exercise of his power of sale contained in the mortgage-deed.

There will also be a decree for possession in the terms of prayer (*c*) and the respondent must pay the plaintiff his costs of the suit and appeal and the plaintiff will be entitled as against the defendant to add his costs to the mortgage security.

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Interest on the mortgage must be calculated for the purpose of this decree at six per cent.

BATCHELOR, J.:—On 3rd April 1903 the property in suit was sold by the defendant to one Mahomedali Abdul Husein for Rs. 9,000, and a receipt for the full sum was endorsed on the deed by the defendant. In fact, however, only Rs. 5,000 had been paid and the balance of Rs. 4,000 remained due by Mahomedali to the defendant. On 7th April 1904 the property was conveyed by Mahomedali under an instrument which the plaintiff describes as a mortgage-deed in his favour. Thus the present controversy is between the plaintiff as mortgagee and the defendant as mortgagor's vendor. The learned Judge below has dismissed the plaintiff's suit upon two grounds, namely, first, that the plaintiff was affected with notice of the defendant's charge as unpaid vendor, and, secondly, that the so-called mortgage-deed was a mere voluntary instrument of trust in favour of unspecified creditors and gave the plaintiff no beneficial interest. The plaintiff appeals, and the judgment of the Court below is attacked on both the grounds on which it was based.

Dealing first with the character of the deed of 7th April 1904, Exhibit B, we find that the learned Judge was of opinion that it fell within the class of instruments discussed in *Wallwyn* v. *Coutts*[1] and *Garrard* v. *Lord Lauderdale*,[2] being merely a revocable settlement in favour of creditors. I am inclined to doubt whether decided cases are of very much direct assistance in this appeal, which must be determined in accordance with the true meaning of the particular deed Exhibit B, but if reference to authorities be desirable, it seems to me that the deed here approximates more closely to that considered in *Siggers* v. *Evans* [3] than to that dealt with in *Garrard* v. *Lord Lauderdale*[2].

But I think that this deed should be construed upon its own terms in the light of the actual relation there shown to have been existing between the parties, and it may be well to recall the direction of the Privy Council in *Hunoomanpersaud's* case [4]

(1) (1815) 3 Mer. 707.
(2) (1830) 3 Sim. 1.
(3) (1855) 5 El. & Bl. 367.
(4) (1856) 6 Moo. I. A. 393 at p. 411.

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that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Now the deed on its face purports to be a deed of mortgage for the purpose of securing a sum of Rs. 6,200 due on loans already procured by the plaintiff and any further sum up to a limit of Rs. 7,000 which the plaintiff may procure as advances to the mortgagor. It is true that the plaintiff is not referred to as the person *by* whom, but only as the person *through* whom the moneys are to be advanced; but it is proved, though proof was hardly needed beyond the internal evidence, that the deed was drawn by an inexpert clerk, and it appears further that the Rs. 6,200 were then treated as owing to the plaintiff, partly on outstanding *hundis* and partly on promissory notes executed by Mahomedali. It is the fact that this particular sum of Rs. 6,200 has since been paid off, but a further liability of Rs 5,700 has been incurred by Mahomedali towards the plaintiff in respect of *hundis* which the plaintiff has met on behalf of Mahomedali who has given promissory notes for the amount. The deed purports to be a security for all persons who may accept, pay or discount any *hundis*, bills, notes or drafts or make loans, credits or advances to Mahomedali. I agree with Mr. Raikes that it would be a harsh construction to exclude the plaintiff who was the only creditor when the deed was executed and who is a creditor still in respect of such payments as the mortgage contemplated. Unless the deed be read with an abstract technicality which in my opinion would be inappropriate, there is nothing in it which debars the plaintiff from making the advances himself, and, having done so, from claiming the benefit of the security. There was ample consideration moving from the plaintiff, and the deed was clearly not one which it lay within Mahomedali's power to revoke. I am of opinion that the plaintiff as creditor is entitled to claim the benefit of this security. Though promissory notes were taken from Mahomedali, there is nothing to suggest that the plaintiff intended to abandon the security of the mortgage; indeed the evidence shows that he had no such intention.

The same result follows if we have regard to the plaintiff's position as surety under section 141 of the Indian Contract Act. For the evidence shows that the *hundis* now in question were paid by the firms of Wadhuram and Ussarali on the assurance of the plaintiff, and that, upon their being dishonoured subsequently the plaintiff made good the amounts to the holders on behalf of Mahomedali. If, then, these holders would be entitled to the benefit of the security furnished by Exhibit B—and that, I understand, is not denied—the plaintiff, who has paid them off, becomes similarly entitled in their place. I may add that, despite certain phrases to which Mr. Mirza has called our attention in the account entries Exhibits J and K, I am of opinion on the evidence that these moneys were paid by the plaintiff, who is shown to have referred at least in the presence of one of the shroffs, to the mortgage-deed as his security. It is suggested that the plaintiff put forward no claim as surety in the Court below, but the judgment of Macleod, J., clearly indicates that the point was mentioned and discussed before him.

Then there is the question whether the plaintiff's claim under the mortgage should be postponed to the charge over the property which is given by sub-section (4) (*b*) of section 55 of the Transfer of Property Act. The section gives the charge over the property "in the hands of the buyer," but for the purposes of this case we may assume, though the point is by no means clear, that in *Webb* v. *Macpherson* [1] it was intended to decide that the charge was extended to persons claiming through the buyer. Even upon this construction the defendant is not, I think, entitled to rely upon her charge as against the plaintiff, for she is estopped from doing so under section 115 of the Evidence Act by reason of the receipt for the full purchase-money which she endorsed upon the deed of sale. That was a declaration by the defendant which intentionally caused the plaintiff to believe that the entire price had been paid and to act upon that belief. The declaration was made "intentionally" within the meaning of the section, as the word has been explained in *Sarat Chunder Dey* v. *Gopal Chunder Laha* [2], that is, the declaration was so made that a

(1) (1903) L. R. 30 I. A. 238 : 5 Bom. L. R. 838. (2) (1892) 20 Cal. 296.

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reasonable man would take it to be true and believe that it was meant that he should act on it; and the evidence proves that in fact the plaintiff did believe the representation to be true and did act upon it. In my opinion, therefore, the defendant is estopped from relying upon this charge. Though the statutory charge given to the seller in India differs from the unpaid vendor's lien under English Law, it may be observed that the conclusion I have reached as to the effect of estoppel is consistent with the English decisions which have held that a vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser. See *Rice* v. *Rice*[1]. And as against a clear estoppel, such as we have here, I can see no reason to suppose that the statutory charge occupies any higher position than the unpaid vendor's equitable lien in England.

As to the argument that the plaintiff should be affected with notice of the defendant's charge, I am clearly of opinion that it must fail.

Under section 3 of the Transfer of Property Act the plaintiff can be said to have had notice only if he had actual knowledge, or if he wilfully abstained from inquiry or if he was guilty of gross negligence. It is plain from the evidence that actual knowledge of the defendant's charge cannot be said to have been possessed by the plaintiff and that apparently is the finding of the learned Judge. But the Judge has held that plaintiff was aware of circumstances which should have put him on inquiry and that, since he made no inquiry, he must be affected with notice. But, in the first place, it seems to me that the plaintiff was not bound to make inquiry, but was entitled to rely upon the representation in the sale-deed: see *Redgrave* v. *Hurd*[2]. Then I find difficulty in ascertaining how far the learned Judge did in fact believe the witnesses called for the defendant on this point. He says plainly that in his opinion it is quite possible that they have made additions to their story which are not founded upon facts, but in the main he finds that they were

(1) (1853) 2 Drew. 73.

(2) (1881) 20 Ch. D. 1.

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telling the truth. But it is in the main that he has disbelieved them, for the point of their story is that the defendant had actual knowledge. If that be disbelieved, I think it is impossible to give effect to the other vague evidence given after a lapse of over three years by witnesses who had no special reason to recollect the commonplace events in question and who are not free from the imputation of being interested in the cause. It should be observed further that the allegation now under consideration was not made against the plaintiff until a very late stage, and the evidence on which it is now sought to be supported is, in my opinion, insufficient. I, therefore, come to the conclusion that it cannot be said that the plaintiff was guilty either of wilful abstention from inquiry or of gross negligence. It follows that his claim under the mortgage is not subject to the defendant's charge. The decree of the Court below must, therefore, be reversed and there must be a decree in the terms stated by the Chief Justice.

Decree reversed.

Attorneys for the appellant: *Messrs. Jehangir, Gulabbhai and Bilimoria.*

Attorneys for the respondent: *Messrs. Mirza, Mirza & Mangaldas.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

RUKHANBAI, PLAINTIFF, *v.* ADAMJI SHAIK RAJBHAI AND OTHERS, DEFENDANTS.*

1908. *April* 3.

Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of 1882), s. 375—Adjustment of suits, what is—Written submission necessary.

The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Assistant Commissioner for taking accounts, and a large mass of accounts, objections and sur-

* Suit No. 77 of 1906.

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charges were filed by the various parties. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him. The 1st and 6th defendants with their attorney were present at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained to the 1st and 6th defendants in turn his proposal and told them that whatever award he made would be binding on them. To this they agreed, the 1st defendant even saying he would take one rupee if that was the sum awarded to him. It was also agreed that the Assistant Commissioner should draw up his findings in the form of a consent decree to be taken by the parties as that would save the parties a large sum in costs. At another meeting before the Assistant Commissioner the latter recorded his findings and then proceeded to draw up the consent decree embodying these findings therein but the defendants 1 and 6 refused to be bound by his decision. Upon application being made by the plaintiff that an adjustment of the suit might be recorded under section 375 of the Civil Procedure Code on the basis of the Assistant Commissioner's decision.

Held, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by section 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation, and could therefore have no legal consequences. As there had been no reference to arbitration and no award there could be no adjustment to give effect to under section 375 of the Civil Procedure Code.

Samibai v. *Premji Pragji*(1) and *Pragdas* v. *Girdhardas*(2) considered and distinguished,

THE facts of this case appear sufficiently from the headnote and judgment.

Strangman for plaintiff.

Davar for defendant 2.

Chamier for defendants 1 and 6.

BEAMAN, J.—This was an administration suit: a decretal order was passed referring it to the Commissioner to take the usual accounts. When the matter came before the Assistant Commissioner Mr. Modi, it appears from his notes (the substantial correctness of all the facts contained in which is not disputed) that

(1) (1895) 20 Bom. 304. (2) (1901) 26 Bom. 76.

with the object of saving parties considerable delay and expense, he proposed that they should leave the settlement of all matters in dispute between them in his hands. All the parties consented. From Mr. Modi's record, it is clear that they then agreed unreservedly and without any qualification to allow him to deal summarily with all the disputed matters and to draft (as he calls it) a decree by which they were to be finally bound. He says he fully explained every term of this proposal to the parties and in particular impressed upon the defendants that even should his decree award them no more than a rupee they were to be bound by it. To these terms all the parties assented. Thereupon Mr. Modi made what he calls a draft decree. Mr. Strangman for the plaintiff and defendant No. 4 now moves the Court to confirm this report and give a decree in its terms. Defendant No. 6 represented by Mr. Chamier objects on the ground, as I understand him, that the principle upon which Mr. Modi has arrived at his conclusion is incorrect and not a principle upon which he (the sixth defendant) thought he would act. When the motion came on, Mr. Strangman asked the Court to record Mr. Modi's report as an adjustment, compromise or satisfaction of the suit under and within the meaning of section 375 of the Civil Procedure Code and thereon pass a decree in accordance therewith. To this Mr. Chamier objected that he had received no notice of any such application, that he was entitled to notice; and that not having been given notice, this application could not now be proceeded with.

It appears, however, that the suit was down on the board for passing a final decree in terms of the Assistant Commissioner's report, and I am not disposed to defer my decision upon what is substantially in issue in order to give effect to this technical objection. Mr. Strangman for the plaintiff strongly relies on the cases of *Samibai* v. *Premji Pragji* [1] and *Pragdas* v. *Girdhardas* [2]. The latter case was decided in appeal by Sir Lawrence Jenkins, C. J., and Starling, J. There the suit was for dissolution of partnership and accounts. The suit was called on for hearing on the 24th February 1899 and by consent a decretal order

(1) (1895) 20 Bom. 304. (2) (1901) 26 Bom. 76.

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was made referring it to the Commissioner to take the accounts. On the 31st March 1899 before any accounts were brought into the Commissioner's office, the parties referred the subject matter of the suit to arbitration and on the 28th of June 1900 the arbitrators made their award. On the 7th December 1900 the plaintiffs gave notice that they would move in Court, that the agreement and the award be recorded under section 375 of the Civil Procedure Code. A decree was passed accordingly on the 13th December 1900 in which the submission and the award were recorded under the said section and the terms of the award were embodied in it. The Appeal Court held that the reference and the award constituted an adjustment of the suit by a lawful agreement or compromise and upon that ground upheld the decree of the Court below. Their Lordships referred with approval to the case of *Samibai* v. *Premji Pragji*[1] which had been decided in the same way and upon the same principle by Starling, J., on the Original Side of the High Court. It is certainly not easy to distinguish the principle of those decisions from the principle upon which Mr. Strangman now asks me to act. And were I satisfied that no distinction could be drawn, notwithstanding that in some points the conditions of those cases and this case are different, I should feel myself bound by those decisions. After having carefully studied not only those cases but many others dealing with the same question decided in the other High Courts, while I must admit that the weight of authority is heavily on the plaintiff's side I feel very grave doubts as to some parts at least of the reasoning upon which many of those decisions rest. Reference was made in *Pragdas* v. *Girdhardas*[2] to the Full Bench case of *Brojodurlabh Sinha* v. *Ramanath Ghose* [3], where although the decisions of the majority were substantially in accord with the view taken by Starling, J., in *Samibai* v. *Premji Pragji*[1] O'Kinealy J., in a dissenting judgment, doubted the correctness of that decision. For my own part, speaking with all respect to the eminent Judges who have adopted the contrary opinion, I think that that Judge's doubt was well founded. Again Jenkins,

(1) (1895) 20 Bom. 304. (2) (1901) 26 Bom. 76.
(3) (1897) 24 Cal. 908.

C. J., says "that the decision in *Samibai* v. *Premji Pragji*[1] has met with the approval of Farran, C. J., in *Ghellabhai* v. *Nandubai* [2]" The passage referred to however is merely an *obiter dictum*. So, too, in the case of *Lakshmana Chetti* v. *Chinnathambi* [3] in which Sir Lawrence Jenkins says that Mr. Justice Starling's view, if not affirmed, certainly was not rejected, the most that can be said is that the Judges there in an *obiter dictum* seem to have approved of it. It is perhaps worth noting that the submission to arbitration in *Pragdas* v. *Girdhardas*[4] was made before the Indian Arbitration Act had come into force. I do not myself think that that circumstance materially affects what seems to me the fundamental principle of the decision. The learned Chief Justice says: "First it is said that Chapter 37 of the Civil Procedure Code, 1882, is an exhaustive exposition of the power to refer to arbitration pending a suit. I can find nothing, however, in Chapter 37 which invalidates a proceeding not in accordance with its provisions beyond the result that non-compliance deprives a party of a right to claim the consequences the Chapter prescribes." And I apprehend that the same process of reasoning would apply to any submission to arbitration which does not comply with the requirements either of Chapter 37 of the Civil Procedure Code or of the Indian Arbitration Act IX of 1899. But it seems to me that where a special procedure is provided for extraordinary extra-judicial methods of settling disputed claims, it must have been the intention of the legislature that that procedure and no other was to be followed. To say that Chapter 37 was not, before the passing of the Indian Arbitration Act, an exhaustive exposition of the powers to refer to arbitration and that a reference to arbitration not made in accordance with its provisions might nevertheless be given much more speedy and peremptory effect to by bringing it in under section 375 for the reason that "non-compliance deprives a party of a right to claim the consequence the chapter prescribes"—seems to me, speaking with the greatest respect, a questionable proposition. Because the reason advanced to support it will, when closely examined, become, I think, quite inadequate. What is

(1) (1895) 20 Bom. 304.
(2) (1896) 21 Bom. 385.
(3) (1900) 24 Mad. 326.
(4) (1901) 26 Bom. 76.

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implied in it is that by not complying with the statutory provisions regulating submission to arbitration, the worst that can befall a party so failing to comply is the loss of some advantage that he would have gained by compliance. But if notwithstanding that he can take the benefit of section 375, so far from being in a worse he is in a much better position than if he had been bound by the provisions either of the Indian Arbitration Act or of Chapter 37. In both the latter cases a party, who, after making a proper submission, is dissatisfied with the award, has a right of challenging it before it can be converted into a decree or any further action taken upon it. Whereas under the principle of *Pragdas* v. *Girdhardas*[1] no sooner has a party made an irregular submission, on which an award, no matter how full of defects, has been passed, than the other party can bring it in under section 375 and, without having any objections investigated, get a final decree upon it. This appears to me, speaking with all proper respect, one fatal objection to the principle upon which the plaintiff here relies. Another objection which I myself feel very strongly, though I cannot deny that this does seem to have been present to the mind of other more learned and eminent Judges who have nevertheless no difficulty in overcoming it, is that a mere agreement to refer a matter to arbitration, cannot logically and without unduly straining language, be fairly called an adjustment of a suit. Nor do I think that that difficulty is removed by the fact that an award is made. No doubt if the parties accept the award, then the agreement to refer plus the award which they had accepted, would constitute an adjustment of the suit by a lawful agreement. But mere submission to arbitration cannot, I think, be carried further than a step towards the adjustment of a suit. This difficulty is dealt with in *Pragdas* v. *Girdhardas*[1]. The learned Chief Justice, relying upon *Lievesley* v. *Gilmore*[2], says: "But every submission to arbitration implies an obligation to perform the award of the arbitrator; so that here there was an agreement to perform the award in adjustment of the suit, and that is an adjustment of the suit by agreement." One obvious

(1) (1901) 26 Bom. 76 at p. 78.

(2) (1866) L. R. 1 C. P. 570.

objection to that reasoning is that it does away at once with the necessity for all the special procedure prescribed in the Indian Arbitration Act and Chapter 37 of the Civil Procedure Code. For if that principle be uniformly sound and accepted, parties submitting to arbitration would be under an implied promise to accept the award, whatever be its nature and however it has been arrived at. That is in fact what they are obliged to do by applying the principle in the same manner in which it has been applied in those cases, so as to enable a party wishing to enforce the award to do so directly under section 375. It would be easy to pursue this analysis further by way of explaining and justifying the doubts I feel about the correctness of the decision in *Pragdas* v. *Girdhardas*[1]. But, as I have said, unless I can distinguish that from the present case I should undoubtedly feel myself bound to follow it. There is, however, one passage in the learned Chief Justice's judgment, which does, I think, warrant me in saying that this is a different case. He says: "it is conceded, and I must assume correctly, that under the special circumstances of the case the submission is valid." I will not pause, as I might do, to amplify the implication contained in these words beyond saying that notwithstanding what has preceded, the learned Chief Justice evidently thought that a submission to arbitration, before it can be treated as an adjustment of the suit, must be "valid," that is to say, made in conformity with the law governing arbitration proceedings. I need not further dwell upon the difficulty which an accurate analysis of what is herein implied might introduce in logically and consistently interpreting the whole judgment. It is enough for my present purpose to point out that had the learned Chief Justice felt any doubt as to the validity of the submission, it is at least fairly arguable whether he would have come to the conclusion he did. In that case, as indeed in all the other cases to which it refers, there was a written submission. It is true that, at that time, the Indian Arbitration Act was not in force, and that presumably as this submission was held not to fall within the scope of Chapter 37, there was no statutory need for a written

(1) (1901) 26 Bom. 76.

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submission. Now, however, section 4 of the Indian Arbitration Act requires that wherever that Act is in force, submission to arbitration must be in writing. In the present case there has been no such written reference or submission. I am not denying that this is a technical rather than a substantial distinction because, from Mr. Modi's record, it is quite clear that what he wrote down in the present case fairly and fully expressed all the wishes and intentions of the parties, and had they signed his notes there would have been, to all intents and purposes, a written submission of the kind required by law. As the facts stand, there has been no legal and valid reference to arbitration at all. Mr. Modi's award therefore, (for it really is an award and nothing else) has no legal foundation, and can, therefore, have no legal consequences. That, I think, is sufficient, in the view I take of section 375 and of the decisions upon it, to relieve me from the necessity of following against my own judgment the majority of those decisions. As, then, there has been no reference to arbitration and no award, what adjustment of the suit can there be to which I am asked to give effect under section 375? It appears to me that there can be absolutely none. I come to this conclusion with great reluctance because it is clear that all the merits are on the plaintiff's side. There can be no question that all the parties did authorise Mr. Modi to settle their disputes and did agree to accept his decision as finally binding upon them. When, however, that decision came to be known, the defendant 6 repudiated it. He has thus gone back upon his own distinct undertaking and I cannot pretend that I feel the least sympathy with him because he has succeeded upon a highly technical point. Indeed I feel so strongly in this matter that although he is here nominally successful, I shall order him to pay all costs which may have been incurred from the date on which all parties, including himself, agreed before Mr. Modi, that he should finally decide their disputes, up to the date of the final order upon this motion.

Upon these terms I direct that the motion be dismissed and that the matter be referred back to Mr. Modi to take it up as and from the date upon which the parties agreed to make him their sole arbitrator.

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Special Commissioner to pay the costs of the other parties out of the share of defendant 6.

Attorneys for the plaintiff: *Messrs. Jehangir and Seervai.*

Attorney for defendants 1 and 6: *Mr. N. B. Vakil.*

Attorneys for defendant 2: *Messrs. Mehta and Shomji.*

Attorneys for defendant 4: *Messrs. Jehangir and Seervai.*

B. N. L.

APPELLATE CRIMINAL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR *v.* TRIBHOVANDAS PURSHOTTAMDAS MANGROLE-WALLA.*

1908. *August* 17.

Criminal Procedure Code (Act V of 1898), sections 225, 233, 234, 235, 236 and 237—Charges—Joinder of charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), sections 124A, 153A—Sedition—Promoting enmity, etc., between classes—Publication, what constitutes.

The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges, one with respect to each of the two articles he published on different dates in his newspaper called the *Hind Swarajya*. At the trial there was no other evidence of the publication of the newspaper in Bombay except the declaration made by the accused under the Press Act, and the depositions of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial,

Held, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

Held, further, that the trial was not bad as there had been no misjoinder of charges.

Per CHANDAVARKAR, *J.*:—It is true that the Magistrate framed two charges one with respect to each of the two articles. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A of the

* Criminal Appeal No. 237 of 1908.

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Indian Penal Code, so that the accused had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of section 225 of the Code of Criminal Procedure.

There is nothing in the Criminal Procedure Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the Indian Penal Code, the section or sections in either case being the same, the joinder of the charges under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offiences of the same kind.

Per HEATON, J. :—Section 234 of the Criminal Procedure Code does not say that at most, a trial must be limited to three charges : it says it must be limited to three offences and that the offences must be of the same kind. The "offence" as defined by the Code itself, is the act or omission made punishable. The offences in this case were two in number, namely, the publication of two articles on two different dates. These two offences were, as charged, punishable under the same section of the Indian Penal Code, and were, therefore, offences of the same kind. The word "section" in section 234 of the Criminal Procedure Code is not invariably to be read as singular. It is not the intention of the Code of Criminal Procedure, either express or implied, to exclude from the operation of section 234 of the Code, an offence because it is made the subject of more than one charge.

Charging one act or series of acts under more than one section of the Indian Penal Code, is a proceeding provided for in section 235 (clause 2) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code. The Court may charge an offence twice over under two different sections but by so doing it cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge.

APPEAL from convictions and sentences passed by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The accused was the editor, publisher and proprietor of a newspaper called the *Hind Swarajya* published in the Gujarati language. He was charged with two offences punishable under sections. 124A and 153A of the Indian Penal Code, with respect to an article entitled "Englishmen afraid of the pen" which appeared in an issue of his newspaper dated the 4th April 1908; and also with reference to another article entitled "A grave warning" which appeared on the 11th idem in his newspaper.

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He was tried by the Chief Presidency Magistrate of Bombay where he was charged as follows:—

"I, A. H. S. Aston, Esquire, Chief Presidency Magistrate, Bombay, hereby charge you Tribhovandas Purshottamdas Mangrolevalla, as follows:—

"That you on or about the 4th day of April 1908 at Bombay by words intended to be read, namely, an article in the Gujarati which is headed when translated 'Englishmen afraid of the pen' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A, Indian Penal Code.

"2ndly:—That you on or about the 11th day of April 1908 at Bombay by words intended to be read, namely, an article printed in the English and Gujarati languages which is headed when corrected and translated 'A grave warning' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charges."

At the trial, the prosecution tendered into evidence the declaration made by the accused under the Press Act before the Chief Presidency Magistrate of Bombay, as the printer and publisher of the "*Hind Swarajya*." And there were two witnesses on behalf of the prosecution, the Oriental Translator to the Government of Bombay and a clerk in his office, who deposed to having received the copies of the newspaper in Bombay in their capacity as Government servants.

The Magistrate convicted the accused on both the charges, and sentenced the accused to two years' rigorous imprisonment on the first charge and to one year's rigorous imprisonment on the second charge: the sentences to run consecutively.

The accused appealed to the High Court.

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Baptista for the accused :—There is no evidence of publication of the newspaper in Bombay. The declaration by the accused under the Press Act is no evidence of publication: nor would publication be proved by depositions of two witnesses who received copies of the newspaper in Bombay merely as and in their capacity of Government servants.

Secondly, the trial is bad on the score of misjoinder of charges. The accused is charged with both under section 124A and section 153A of the Indian Penal Code in respect of each of the two articles that appeared in his newspaper on the 4th and 11th April 1908, respectively. The offence under section 124A is distinct from the one under section 153A: and a separate charge for each of them should have been framed. The Criminal Procedure Code positively enacts that two charges are necessary, this is an illegality and not an irregularity which could be cured under section 537 of the Code. See *Emperor* v. *Fattu*[1]; *Subrahmania Ayyar* v. *King-Emperor*[2]; *Sukh Lal Sheikh* v. *Tara Chand Ta*[3]; *Thomas* v. *Emperor*[4]; and *Queen-Empress* v. *Anant Puranik*[5].

The forms of charges in the schedule to the Criminal Procedure Code distinctly indicate that there ought to be separate counts for separate offences; and even a separate head of charge for each offence under the same section in the same transaction. See the form regarding the substantive offence and the attempt under section 241 of the Indian Penal Code. Furthermore, the form prescribes three heads of charge for section 382 of the Indian Penal Code. This is a clear indication that legislature requires that the charges should be very specific, definite and distinct for each offence.

Assuming that the Magistrate has complied with the provision of section 233 so far as charges are concerned, then the particulars as required by section 225 are not given. He ought to have pointed out the passages in the first article that came within the purview of section 124A and those that came under section 153A.

(1) (1903) 23 All. 195.
(2) (1901) 25 Mad. 61.
(3) (1905) 33 Cal. 68 at p. 72.
(4) (1906) 29 Mad. 553.
(5) (1900) 25 Bom. 90.

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Section 233 of the Criminal Procedure Code says that each charge shall be tried separately. In this case there are four offences and two charges. Section 234 is an exception to section 233. But offences under sections 124A and 153A of the Indian Penal Code are not offences of the same kind, and the articles of the 4th and 11th April are not parts of the same transaction within the meaning of section 235 of the Criminal Procedure Code.

Branson (acting Advocate General) for the Crown:—Sections 234, 235, 236 and 239 of the Criminal Procedure Code are exceptions to section 233 of the Code. Section 235 is put after section 234 to meet with those cases where facts alleged show that they come under two or more different sections of the Indian Penal Code. There is therefore no irregularity in joining section 153A read with section 124A in the charge.

CHANDAVARKAR, J.:—This is an appeal from the judgment of the Chief Presidency Magistrate of Bombay, convicting the appellant of two offences one under section 124A and the other under section 153A of the Indian Penal Code arising out of each of two articles, published in a Gujarati newspaper called the *Hind Swarajya*. Several points of law have been urged by the appellant's Counsel, Mr. Baptista. The first of them is that the learned Chief Presidency Magistrate had no jurisdiction to try the case. This objection to jurisdiction is based upon the ground that there is upon the record no evidence of the publication of the newspaper in Bombay. But three witnesses examined for the Crown state that they received the newspaper in Bombay; and there is the declaration made by the appellant himself under the Press Act. The mere fact that two of the witnesses are servants of Government, who received the newspaper as its agents, cannot in law render their evidence inadmissible on the question of publication.

The second and the third point urged by Mr. Baptista have hardly any substance. It is contended that the trial is rendered illegal because the learned Magistrate did not frame a separate charge for every distinct offence, as required by the first part of section 233 of the Code of Criminal Procedure. It is true that

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the Magistrate framed two charges—one in respect of the article of the 4th of April and the other in respect of the article of the 11th of April, 1908. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A, so that the appellant had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of section 225 of the Code of Criminal Procedure. It is further contended that the trial is illegal because the particulars in respect of each of the charges were not given by the Magistrate by the specification in the charge sheet of the passages in each of the articles, which, according to the case for the Crown, brought those articles within sections 124A and 153A of the Penal Code. But the case for the Crown was in the Court below, as it is here, that each of the two articles taken as a whole brought the act of the appellant within each of these sections. Under those circumstances no specification of any particular passages was called for.

I pass on now to Mr. Baptista's argument that the trial is illegal on the ground of misjoinder of charges. The misjoinder complained of is that the offence charged under section 124A of the Indian Penal Code, arising out of the article of the 4th of April, being distinct from, and not an offence of the same kind as, the offence charged under section 153A of the same Code, arising out of the article of the 11th of April, and that the offence charged under section 153A as arising out of the former article being distinct from and not an offence of the same kind as the offence charged under section 124A as arising out of the latter article, the learned Magistrate ought not to have tried these charges together at one trial. It is admitted by Mr. Baptista that the charge for the offence under section 124A of the Penal Code in respect of one of the two articles in question could be legally joined to the charge for the offence under the same section in respect of the other article. And in such a case it is equally clear from sections 236 and 237 of the Code of Criminal Procedure that, if in respect of each of the articles the evidence recorded substantiated the offence under section 153A, instead of the offence

under section 124A, the accused could be legally convicted of the former offence, even though it did not form the subject-matter of the charge. That being the case, the addition of the offences under that section in the charge sheet cannot be held to be illegal. On the other hand, it was an advantage to the appellant in that he had notice of the additional offence charged, of which he could have been under the Code convicted without any notice in the charge sheet. It is true that, as urged by Mr. Baptista, the offence under section 124A of the Penal Code is not an offence of the same kind as an offence under section 153A of the Code. And the Criminal Procedure Code no doubt provides that those two offences cannot be tried together. But there is nothing in the Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the Penal Code, the section or sections in either case being the same, the joinder of the charges under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind.

Mr. Baptista has not denied the seditious character of the article of the 4th of April. On the other hand, he has candidly admitted before us that he cannot defend the article in question so far as the offence under section 124A of the Penal Code is concerned. The other article, that of the 11th of April, he contends, is a mere republication of what came into the appellant's hands from outside, and was published by the appellant with remarks showing that he did not approve of the sentiments in the article. It is clear, however, from the evidence of surrounding circumstances that the so-called disapproval was feigned and ironical and that the appellant published the article in question because it gave him an opportunity of bringing the established Government of the land into hatred and contempt.

Under these circumstances it is unnecessary to consider whether either of the articles can rightly come under section 153A of the Penal Code.

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We affirm the conviction under section 124A, and as to the sentences we decline to interfere on the ground that they cannot be considered too severe.

HEATON, J. :—Mr. Baptista's first argument was that publication in Bombay was not proved. There is no substance in that.

His main arguments were directed to the charge and were to the effect that as the charge was contrary to law the trial was illegal: a general proposition which he sought to make good by the authority of the Privy Council judgment in *Subrahmania Ayyar's* case [1].

In order to understand the argument it is necessary to set out the charge. It reads as follows :—

"I, A. H. S. Aston, Esquire, Chief Presidency Magistrate, Bombay, hereby charge you Tribhovandas Purshottamdas Mangrolewalla as follows :—That you on or about the 4th day of April 1908 at Bombay by words intended to be read, namely, an article in the Gujarati which is headed when translated 'Englishmen afraid of the pen' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian or European subjects and thereby committed an offence punishable under sections 124A and 153A, Indian Penal Code.

"2ndly :—That you on or about the 11th day of April 1908 at Bombay by words intended to be read, namely, an article printed in the English and Gujarati languages which is headed when corrected and translated 'A grave warning' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charges."

(1) (1901) 25 Mad. 61.

First, it is said that this charge is unlawful because it does not follow the form given in Schedule V to the Criminal Procedure Code for charges with two or more heads, but instead of doing so combines in one whole in each case the charges under sections 124A and 153A. The defect is a very formal one, and is cured by section 225 of the Code which says:—"No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice." The Privy Council case referred to is not an authority for saying that such an error in the charge is an illegality vitiating the trial. It is only necessary to read the judgment in that case to see that their Lordships of the Privy Council were dealing with a grossly illegal trial; and there is apparent throughout that judgment as strict an adherence as possible to the facts of that particular case; and as little generalization as is compatible with a true presentment of their reasons.

Mr. Baptista's next objection was that though it was not illegal to charge the appellant on the articles as a whole, yet when charged in respect of each article under sections 124A and 153A, he was prejudiced as he did not have notice of the particular passages in each article on which the prosecution relied to bring it first under section 124A and secondly under section 153A. To this the answer is that as regards these charges the prosecution did not proceed on seperate passages but on the articles as a whole. But Mr. Baptista argues in effect that his client ought to have had notice, before he was required to enter on his defence, of the process of reasoning by which the prosecution brought each article under section 124A and also under section 153A of the Penal Code. Whatever application such an argument may have to cases in general, it fails in its application to this case, because the process of reasoning which the prosecution followed, was to deal with the articles as a whole and not with particular passages and the accused had notice that he was charged under section 124A and under section 153A in respect of each article as a whole.

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The last of Mr. Baptista's technical arguments was that the joinder of the charges relating to the two publications of the 4th and 11th April, was illegal and vitiated the trial. He assumes for the purpose of this argument that there were four charges, two relating to each article; and he urges that as each of the four charges did not relate to an offence of the same kind, they could not be tried together. He bases his argument mainly on sections 233 and 234 of the Code of Criminal Procedure which run as follows:—

"233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.

"234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three.

"(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law."

Section 234 does not say that at most a trial must be limited to three charges: it says it must be limited to three offences and that the offences must be of the same kind. The "offence" as defined by the Code itself, is the act or omission made punishable. The offences in this case were two in number, namely, the publication of the 4th April and the publication of the 11th April. These two offences were, as charged, punishable under the same sections of the Indian Penal Code and were, therefore, it seems to me, offences of the same kind. If the word "section" in the second clause of section 234 be read as incapable of meaning "sections," that is, if it be read as invariably singular, then Mr. Baptista's argument is good, not otherwise. But I do not think it is the intention of the Code, either expressed or implied to exclude from the operation of section 234 an offence because it is made the subject of more than one charge.

Charging one act or series of acts under more than one section of the Indian Penal Code is a proceeding provided for in section 235 (cl. 2) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code which

says: "where anything is an offence falling within two or more separate definitions . . . . the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences." You may charge an offence twice over under two different sections but by so doing you cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge. Therefore I do not think the joinder of charges in this case was contrary either to the express words or the principle of the law.

On the merits there is little to be said. A careful perusal of the article of the 4th April shows a deliberate design to excite feelings of disaffection towards the Government established by law in British India, or to bring that Government into hatred and contempt. The nature and tone of the article or letter of the 11th; the general character of *Hind Swarajya* as evidenced by its own publications; the circumstance that the letter said to be received from outside was translated into Gujarati; and the introductory words printed before the translation, taken together, convince me that the publication of the 11th also was deliberately designed to do the same. It is not very material to consider whether the offences also fell under section 153A of the Indian Penal Code. The convictions are, in my opinion, good under section 124A; and the sentences, I consider, are not too severe. So I concur in the order confirming the conviction and sentences.

Conviction and sentence confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1908. *September 9.*

RAMAKRISHNA *alias* RAMASWAMI BIN KUPPUSWAMI (ORIGINAL PLAINTIFF), APPELLANT, *v.* TRIPURABAI KOM KUPPUSWAMI MODLIAR (ORIGINAL DEFENDANT), RESPONDENT*.

Hindu law—Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation.

Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage.

Thus, if a widow, before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

Lakshman v. *Radhabai*(1) and *Moro* v. *Balaji*(2), followed. *Sreeramulu* v. *Kristamma*(3), not followed.

SECOND appeal from the decision of T. D. Fry, District Judge of Dhárwár, confirming the decree passed by V. V. Phadke, First Class Subordinate Judge at Dhárwár.

Suit for a declaration that the plaintiff was the owner of certain property.

The property in dispute belonged to one Kuppuswami, who died leaving him surviving his widow Tripurabai (defendant No. 1). She went into possession of the property; and mortgaged the same with the defendant No. 2 for Rs. 400. The mortgagee (defendant No. 2) obtained a decree on his mortgage: the property was sold in execution of the decree and purchased by defendant No. 3.

* Second appeal No. 870 of 1907.

(1) (1887) 11 Bom. 609. (2) (1894) 19 Bom. 809.

(3) (1902) 26 Mad. 143.

After this, Tripurabai adopted the plaintiff on the 28th January 1905.

On the 10th March 1905, the plaintiff as the adopted son of Kuppuswami brought a suit, to obtain a declaration that he was the owner of the property.

The Subordinate Judge held that the transaction entered into by Tripurabai was for good consideration and valid, and was binding on the plaintiff. His reasons were as follows :—

"Almost at the close of the trial the defendants produced a certified copy of a decision of the Bombay High Court (*Bhaudixit* v. *Ishwardixit*(1)), wherein it has been held that an adopted son of a Hindu widow has no right during her life-time to question the validity of alienations effected by the widow before his adoption. It is clear that this decision will bar the present suit. This Court is bound to follow a decision of the High Court but I have got my own misgivings owing to the fact that the decision has not been reported even in the Bombay Law Reporter. These cases are likely to go before the High Court where the decision now relied on by the defendants may be reconsidered."

On appeal, this decree was confirmed by the District Judge on the following grounds :—

"I have before me the decision of the Bombay High Court in the unreported case referred to by the Subordinate Judge. It does not, however, seem necessary for me to discuss the propriety of following an unreported judgment as I propose to follow the Madras judgment in *Sreeramulu* v. *Kristamma* (26 Mad. 143), which appears to conclude the question at issue.

It is urged on the other side that this ruling is opposed to the Bombay rulings in *Laxman* v. *Radhabai* (11 Bom. 609) and *Moro* v. *Balaji* (19 Bom. 809).

If this were so, I should, of course, follow the Bombay rulings, but it seems clear that the Madras case raises and decides the point for the first time.

On page 148 of the Madras judgment occurs the following passage :—

"In the few reported cases in which a son adopted by a widow brought a suit during her life-time to set aside alienations made by her prior to the adoption, the decision proceeded on the assumption that he would be entitled to recover possession of the property alienated, unless the alienation were made for a purpose which would be binding upon a reversionary heir. In all the cases in which the alienation was set aside at the instance of the adopted son, the decision proceeded only on the ground that the widow exceeded her lawful power in making the alienation. In none of them was the question distinctly

(1) S. A. No. 146 of 1905 (Unrep.).

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raised and considered, whether the vendee would not in any event be entitled to retain possession during her life-time as the widow of her deceased husband."

The point is then considered at length and the suit brought by the adopted son is dismissed as premature.

I thus have excellent authority for holding that this decision is not opposed to any former decision.

That being the case it is clearly my duty to follow this judgment unless and until it is dissented from by the Bombay High Court. More especially is that course incumbent on me when I find it remarked on page 155 that the rule "is not only sound in principle but is in consonance with justice and equity."

The plaintiff appealed to the High Court.

A. G. Desai for the appellant:—The decision in *Sreeramulu* v. *Kristamma*[1] is no doubt against me; but it is opposed to the rulings of this Court in *Lakshman* v. *Radhabai*[2]; *Moro* v. *Balaji*[3], which should be followed here.

G. S. Mulgaonkar for the respondent:—The question raised in this appeal was argued in *Bhaudixit* v. *Ishwardixit*[4], where the Madras case is followed. It has, however, not been followed in *Raoji Nana* v. *Kesu Nana*[5].

CHANDAVARKAR, J.:—The District Judge has rejected the appellant's claim, holding, on the authority of *Sreeramulu* v. *Kristamma*[1], that where a Hindu widow, who has inherited her husband's immoveable property, alienates part of it and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood, even though the alienation was not for a proper or necessary purpose, justified by Hindu law. This Madras ruling is directly opposed to the decisions of this Court in *Lakshman* v. *Radhabai*[2] and *Moro* v. *Balaji*[3], which the District Judge has misread in thinking that they are not conclusive on the point. There is an earlier decision of this Court (*Nathaji Krishnaji* v. *Hari Jagoji*)[6], which is equally conclusive. (See page 73 of that report.) Besides, these decisions have been followed in this Court except in one case (*Bhaudixit bin Bhaskardixit* v. *Ishwardixit bin Bhaskardixit*[4]) in which Russell and Batty, JJ., followed the

(1) (1902) 26 Mad. 143.
(2) (1887) 11 Bom. 609.
(3) (1894) 19 Bom. 809.
(4) S. A. No. 146 of 1905 (Unrep.).
(5) S. A. No. 682 of 1907 (Unrep.).
(6) (1871) 8 Bom. H. C. R. A. C. J. 67.

Madras decision. It does not appear to have been brought to the notice of those learned Judges that the law enunciated in *Nathaji Krishnaji* v. *Hari Jagoji*[1] and the other two decisions, (*Lakshman* v. *Radhabai*[2] and *Moro* v. *Balaji*[3]), has been followed in this Court in a number of unreported decisions and has been understood to be well established in this Presidency since the year 1871.

Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death, with this difference that, after the adoption, she has a right of maintenance against the adopted son during the rest of her life, but that right, so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage. These are indisputable propositions of law, and indeed they are admitted in the Madras judgment on the authority of the Privy Council ruling in *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah* [4].

If the widow, before the adoption, severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

But in support of their view the learned Judges who delivered the judgment in *Sreeramulu* v. *Kristamma*[5], rely on those decisions of the Privy Council and of our High Courts, in which it has been held that a Hindu widow has "an absolute right to the fullest beneficial interest in her husband's property for her life," that is, "during the term of her widowhood." Now, as a general proposition of Hindu law, that is true. But the cases in which it has been so held and which are cited in the

(1) (1871) 8 Bom. H. C. R. A. C. J. 67.
(2) (1887) 11 Bom. 609.
(3) (1894) 19 Bom. 809.
(4) (1843) 3 Moo. I. A. 229 at p. 242.
(5) (1902) 26 Mad. 143.

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Madras judgment, were cases in none of which was any question of an adoption by the widow and the effect it has on her estate as heir of her husband, involved. It is straining the language of those decisions, particularly the words "during her widowhood," to apply them to a state of facts not contemplated or covered by those decisions. That general proposition is qualified by the proposition laid down in other cases that such an adoption puts an end to that estate and divests her of it, though her widowhood continues.

The Madras judgment proceeds upon the analogy of an adoption made by a Hindu father after he has alienated any portion of his ancestral property. Now, it is true that the adopted son in such a case cannot question the alienation and that he becomes joint owner with the father only as to such ancestral property as the father was possessed of at the date of the adoption. But there can be no analogy between such a case and a widow making an adoption to her husband. In the case of the father, at the date of the alienation he was full proprietor of the property—he could do what he liked with it so long as there was then no son to restrict his right of alienation to purposes defined by Hindu law. The alienee takes the property absolutely and the subsequent adoption cannot affect it: *Rambhat* v. *Lakshman Chintaman*[1]. It is otherwise with a widow. Though she represents the estate as heir at the date of an alienation by her, her right is of a limited character and she has no absolute right over it except in certain cases defined by law. She can confer an absolute right on her alienee only in those cases; otherwise the alienation has effect only during the time that her widow's estate lasts. That estate, according to Hindu law, comes to an end either when she dies or when she makes an adoption. The alienee takes the property from her subject to that law, provided the alienation was not for a proper or necessary purpose according to Hindu law. It is difficult to see how the case of a father can supply any analogy to the case of a widow, which rests on different principles.

(1) (1881) 5 Bom. 630.

But the learned Judges in the Madras judgment rely on certain observations of the Privy Council in the well-known case of *Moniram Kolita* v. *Kerry Kolitany*(1) as having "an important bearing on the question now under consideration" and as lending support to their view. The observations are :—

"But, further, the widow has a right to sell or mortgage her own interest in the estate .... If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of the estate, if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage."

Laying emphasis on the word "prior," the learned Judges in their judgment remark :—

"It will be noted that in this passage the Privy Council distinctly assume that even if the widow's estate should cease by her committing an act of unchastity and the succession of her husband's heirs should thereby be accelerated, the purchaser or mortgagee, from her, of her own life-interest in the estate, would not be divested of it, if the sale or mortgage had taken place prior to her act of unchastity, but only if it had been *subsequent* thereto."(2)

The observations of the Privy Council must be read by the light of the context in which they occur. The question in *Moniram Kolita's* case(1) was whether unchastity in a widow causes forfeiture of the property which she has inherited from her husband, where such unchastity is subsequent to the inheritance. After dealing with the texts in the Hindu law books on the subject, and concluding on the strength of those texts that such unchastity does not cause forfeiture, their Lordships proceed to refer to Mr. Justice Jackson's judgment as pointing out "the mischief, uncertainty and confusion that might follow upon the affirmance of the doctrine that a widow's estate is forfeited for unchastity, particularly, in the present constitution of Hindu society and the relaxation of so many of the precepts relating

(1) (1880) L. R. 7 I. A. 115 at p. 155. (2) (1902) 26 Mad. 143 at p. 153.

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to Hindu widows." It is in this latter connection that the observations in question occur in the judgment of the Privy Council. First, their Lordships point out that if unchastity in a widow were held to involve the consequence of forfeiture of her estate, the reversionary heir of her husband, if he happened to be her husband's brother, might lead her into temptation and thus accelerate the succession in his own favour. That is one mischief. Next it is pointed out that a person who had taken a purchase or mortgage from her after her unchastity might suffer. The hardship, uncertainty and confusion, in such a case is obvious. The purchaser or mortgagee might not know of the unchastity at the time of the alienation in his favour, and to be deprived of the estate because the unchastity is subsequently *proved*, is hard upon the alienee, because, in that event, he must be treated as a trespasser *ab initio*, having taken the transfer without any title. These considerations do not exist in the case of a purchase or mortgage before the act of unchastity. There the purchaser or mortgagee takes a good title, subject to the condition that it will last until the widow's estate as heir is terminated in any of the modes recognised by Hindu law. Upon the hypothesis that unchastity is one of those modes, the purchaser or mortgagee, who takes the property subject to that condition, cannot complain of hardship, if subsequently the widow turns out to be unchaste, because till then he has the right to the estate. It is in this light that the Privy Council would seem to have made the observations above cited.

There is nothing in the judgment of the Privy Council to warrant the inference that their Lordships intended the observations in question as more than mere "*argumentum ab inconvenienti*," or to convey more than they have said expressly by way of illustration. The inference drawn from them by the Madras High Court is directly opposed to the decision of the Privy Council in *Bamundoss Mookerjea* v. *Mussamut Tarinee*[1] in which they entirely adopted the following *dictum* of the Bengal Sadar Divani Adalat: "In that case, the son, when adopted, became the undoubted heir; and it was of course the

(1) (1858) 7 Moo. I. A. 169 at p. 180.

correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity."

Article 125 of the second schedule to the Limitation Act, 1877, is also invoked by the learned Judges in the Madras judgment in support of their view. That Act, being a law of procedure, should not be presumed to have effected any change in the rights of parties given by the substantive Hindu law. Article 125 applies only to a reversionary heir which indeed a son adopted by a widow is not. But Articles 118 and 119 specially provide for the case of such a son; and where those Articles do not apply, the case must fall within Article 144: see *Moro* v. *Balaji*[1].

It is to be remarked that the judgment of the Madras High Court in *Sreeramulu* v. *Kristamma*[2] throughout confines the principle of its decision to a case where the alienation by a Hindu widow made before the adoption of a son by her, is of only a portion of the property inherited by her from her husband. If the principle is sound, there is no intelligible reason why it should not equally apply to a case where the widow has alienated the whole and not merely a portion of the property. The distinction made throughout the judgment in that respect is purely arbitrary. No authority is cited for it and it rests on no principle derived from texts or decided cases. After this, it is not necessary to follow the judgment in the consideration of the question whether its ruling is "in consonance with justice and equity." Notions of justice and equity vary and the considerations on that head noticed at the conclusion of the judgment may well be counterbalanced by others equally, if not more weighty. Most of those considerations are inapplicable to the law of adoption in this Presidency, where a widow is entitled to adopt a son, unless her husband has prohibited it, whereas in the Presidency of Madras she has to obtain the consent of her husband's *sapindas* to such adoption. In any case, such considerations as are pointed out in the judgment cannot outweigh the established principles of Hindu law.

(1) (1894) 19 Bom. 809. (2) (1902) 26 Mad. 143.

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For these reasons we adhere to the decisions of this Court in *Lakshman* v. *Radhabai*[1] and *Moro* v. *Balaji*[2] not only on the ground of *stare decisis*, but also as being sound Hindu law. Reversing the decree of the lower appellate Court we remand the appeal for disposal according to law on the merits. Costs shall abide the result.

Decree reversed.

R. R.

(1) (1887) 11 Bom. 609. (2) (1894) 19 Bom. 809.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Chandavarkar.

1908.
October 6.

KAVERIAMMA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LINGAPPA BIN RAMA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 50—Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.

On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khâta as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same.

Held, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary.

* Second Appeal No. 576 of 1906.

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KAVERIAMMA v. LINGAPPA.

SECOND appeal against the decision of C. C. Boyd, District Judge of Kánara, confirming the decree of E. F. Rego, Subordinate Judge of Hónávar.

The plaintiffs alleged as follows :—Plaintiff 1's father Parameshwar Bhat died possessed of landed estate the khata of which stood in his name in the revenue records. He died leaving him surviving two sons, Subraya and Ramkrishna, and a daughter, plaintiff 1. Ramkrishna was a minor and he lived in union with Subraya. On Parameshwar Bhat's death the khata of the lands was transferred to Subraya's name. Subsequently Subraya died leaving a widow Gowri. On Subraya's death the khata was transferred to the name of Ramkrishna. Thereafter Ramkrishna also died unmarried and issueless. Plaintiff 1 was thus entitled to the property as heir, she being the sister of Ramkrishna. While Subraya was alive the three defendants and their two brothers executed to him a mortgage-deed of the lands in dispute for Rs. 800. The mortgage was with possession and was dated the 14th December 1895 and on the same day defendant 1 took up the lands on a Chalgeni lease for twelve years and passed a kabulayat to Subraya. The plaintiffs, therefore, brought the present suit against the tenant, defendant 1 and his two brothers, defendants 2 and 3, who were all in possession of the mortgaged property to recover arrears of rent for the years 1902 and 1903. Plaintiff 2 was joined as a party because he had purchased from plaintiff 1 a moiety of her interest in the estate.

Defendant 1 answered *inter alia* that the suit was untenable, that he had no privity of contract or privity of estate with the plaintiffs who were not the lawful owners of the lands, that the lands belonged to his family and were mortgaged with possession to Subraya from whom the defendant alone took them on a lease and paid rent to Subraya and after his death to his widow Gowri, that he had no sort of *vinculum juris* with the plaintiffs, that Ramkrishna had no interest and he was not Ramkrishna's tenant, that defendants 2 and 3 lived separate and they had nothing to do with the leaseholds, that he had paid the rent in suit to Gowri and had taken receipts from her, that he was not aware of the purchase by plaintiff 2 from plaintiff 1, that the purchase was invalid and that the suit was collusive and vexatious.

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Defendant 2 was absent.

Defendant 3 stated that the mortgage-debt which they had contracted was the family money of Subraya and Ramkrishna but the bond was passed to Subraya alone, that Subraya and Ramkrishna lived in union, that he was willing to pay the mortgage-debt to a rightful heir declared by the Court and that he was not liable to pay the rent in suit as the lease was taken by defendant 1 alone.

The Subordinate Judge found that the Chalgeni lease alleged by the plaintiffs was proved, that their title to recover the arrears of rent was not proved, that the payment alleged by defendant 1 was proved, that the payment was binding upon the plaintiffs, that Subraya and Ramkrishna lived in union but the sum advanced for the mortgage-debt was the self-acquisition of Subraya and that the plaintiff was not entitled to recover the arrears of rent claimed. The suit was, therefore, dismissed.

On appeal by the plaintiff the District Judge raised the following issues :—

(1) Was plaintiff's evidence wrongly excluded ?

(2) Was the mortgage amount the self-acquired property of Subraya or the joint family property of Subraya and Ramkrishna ?

(3) Can plaintiffs recover the rent sought ?

(4) Do the payments of rent by defendants to Gowri bind plaintiffs ?

The findings on the said issues were :—

(1) No.

(2) Self-acquired property of Subraya.

(3) No.

(4) No finding necessary.

The District Judge, therefore, confirmed the Subordinate Judge's decree.

The plaintiffs preferred a second appeal.

N. A. Shiveshvarkar for the appellants (plaintiffs).

S. S. Patkar for the respondents (defendants).

The second appeal was heard by Chandavarkar and Heaton, JJ., who, on the 19th July 1907, delivered the following interlocutory judgments :—

CHANDAVARKAR, J. :—There are two points urged before us in support of this second appeal. First it is contended that the evidence of the appellants was wrongly excluded by the Subordinate Judge. The exclusion complained of was under the following circumstances. It appears that the Subordinate Judge and also the parties to the suit were under the impression that the onus lay in the first instance upon the defendants. Accordingly the plaintiff's pleader put in an application on 8th September 1904 praying that the plaintiff's witnesses might be summoned after the defendants' witnesses had been examined. Now, the order passed by the Subordinate Judge which is in Kánarese is clearly to the effect that as prayed by the plaintiffs their application should be brought before him at the conclusion of the defendants' evidence for the purpose of ordering summonses to issue to the plaintiff's witnesses. That meant that the prayer was granted. We think that it was a wrong order to pass. Such an order is calculated to create unnecessary delay in the disposal of cases. However that be, here the plaintiffs were led by the Subordinate Judge's order to believe that their witnesses would be summoned after the defendants' witnesses had been examined: and therefore they were entitled to the summonses when the event contemplated occurred. But the Subordinate Judge declined to issue summonses *then*, because one of the plaintiffs had not come into Court and gone into the witness box though summoned by the defendants. What happened was the defendants wanted to examine one of the plaintiffs; the plaintiff would not come forward and for some reason or other stayed away. But that might be a reason for drawing a presumption against her case on the merits. It is not sufficient to deprive the plaintiffs of the right they had secured under the Subordinate Judge's order. The learned District Judge has treated the refusal by the Subordinate Judge to issue summonses as a matter of discretion. But the previous order of the Subordinate Judge left him no discretion at all. We think therefore that the first point must be decided in favour of the plaintiffs.

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Secondly, the point urged in support of this appeal is that the District Judge has decided the case under the erroneous impression that there is no evidence that Subrao and his brother had any joint property: the appellants' pleader Mr. Nilkanth has read out to us the deposition of defendant No. 1 in which he says that the two brothers not only lived jointly but he (defendant No. 1) has seen their field and their house. This could only mean that there was a house which Subrao held jointly with his brother. There is also evidence to that effect in the depositions, Exhibits 34 and 35. We also notice that in Exhibit 5 defendant No. 3 says "we borrowed family money of Subrao and Ramchandra" which clearly means that Subrao and Ramchandra had some nucleus of joint property from which the money came. If all this evidence is believed, then Subrao and Ramchandra must be regarded as having been the members of an undivided Hindu family and in that case, Subrao having pre-deceased Ramchandra, on Ramchandra's death the first plaintiff as his sister and therefore *gotraja sapinda* would be entitled to the property.

The appeal must go back to the District Judge who will remit the case to the Subordinate Judge.

The Subordinate Judge should resume the suit from the point where the defendants' evidence having closed, the plaintiffs had to begin their case. The defendants' witnesses should be summoned and examined. The Subordinate Judge will then remit the record to the District Judge who will after hearing the parties record his findings on the issues already raised and submit them to this Court.

The findings upon the issues must be returned within four months.

HEATON, J.:—I concur in the order proposed. The case was disposed of by the Subordinate Judge after refusing to grant an adjournment. I am exceedingly reluctant to interfere with the discretion which Chapter III of the Civil Procedure Code confers upon Judges in granting or refusing adjournments. The law gives to them the power and it is not for us in any way to limit it, but in this particular case the Subordinate Judge gave what

from the record appears to have been practically an undertaking that the plaintiffs' witnesses should be summoned after the defendants' witnesses had been examined. It seems to me that in so doing he made a grievous mistake; but having done so, he had of himself limited the discretion which the law gave him as to adjournments and when the time came and the plaintiff requested an adjournment to enable him, in fulfilment of the Subordinate Judge's own undertaking, to obtain the attendance of the witnesses; I consider the Subordinate Judge was bound to grant it.

The first issue raised by the District Court being disposed of by the High Court, the Judge after the remand found upon the remaining issues as follows:—

(2) The mortgage amount was the joint family property of Subraya and Ramkrishna.

(3) The plaintiffs can recover the rent sought from defendant 1.

(4) The payments of rent by defendant 1 to Gowri did not bind the plaintiffs.

After the said findings were certified to the High Court, they were objected to by the respondents (defendants).

The appeal was heard by Scott, C. J., and Chandavarkar, J.

S. S. Patkar for the respondents (defendants):— We object to the findings arrived at by the Judge. He has found in the plaintiffs' favour on the question of title having come to the conclusion that the mortgage-debt advanced to the defendants was the joint family property of Subraya and Ramkrishna and they having died, plaintiff 1, their sister, was entitled to the property as heir. But in this case Subraya's widow Gowri, to whose name the khata of the lands was transferred in the revenue records is not a party and a suit for the declaration of right is now pending between her and the plaintiff. We have already paid rent of the years in suit to Gowri and taken receipts from her. We should not be compelled to pay it twice over. The property was mortgaged with possession to Subraya for a period of twelve years on the 14th December 1905 and defendant 1 took possession of the property under a lease for the same period. Subsequently Subraya and Ramkrishna died and

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Gowri took up the management of the property and the lands were transferred to her khata. She, as the widow of Subraya, was the apparent owner and the lands also being transferred to her name, we, in good faith, paid the rents to her and took from her receipts for the same. We had no knowledge that plaintiff 1 was the heir. As tenants we were estopped from denying the title of our landlord Subraya and his widow Gowri.

We further rely on section 50 of the Transfer of Property Act. The ruling in *Jamsedji Sorabji* v. *Lakshmiram Rajaram*[1] supports our contention. It lays down that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive rent or to sue in ejectment.

N. A. Shiveshvarkar for the appellents (plaintiffs):—On the bases of the fresh evidence recorded after the remand the Judge came to the correct conclusion that our title was proved and that the defendants were liable to pay us the rent claimed. From the beginning the case has been fought out on the question of title. At first it was found that we had not proved our title and consequently the suit was dismissed. Now that the finding on the question of title has been returned in our favour, it is not open to the defendant, at this late stage, to set up *bonâ fides* on his part which he did not set up before.

Section 50 of the Transfer of Property Act does not apply. It cannot be made applicable as observed by the Judge "without unduly straining the meaning of the words used". The illustration to the section indicates the class of cases contemplated by the section.

Defendant 1 held the lands as the tenant of Subraya and any payment made to him in good faith would exonerate the defendant from liability to the rightful heir. But directly Subraya died, the defendant could not claim the protection of the section. It was his duty to inquire and to ascertain what persons were entitled to the rent.

Patkar, in reply.

SCOTT, C. J.:—This suit was brought by the plaintiffs to recover rent from the first defendant on the ground that he

(1) (1888) 13 Bom. 323.

was the lessee of certain property to which the first plaintiff had become entitled as heir of her deceased brothers.

The property had come into the possession of the first plaintiff's family by a deed of mortgage, dated the 14th of December 1895, which was executed with possession in favour of Subraya although the mortgage money was advanced by Subraya on behalf of himself and his younger brother. On the same date, the 14th of December 1895, Subraya in his own name granted a lease of the property for 12 years to the first defendant. Subraya after some years died, his interest as mortgagee surviving to his younger brother Ramkrishna. Ramkrishna thereafter died and the person who became entitled as his heir was the first plaintiff. The first plaintiff, however, did not live with her brothers and upon the death of Ramkrishna the property was taken possession of and managed by Subraya's widow Gowri, who, after Ramkrishna's death in the year 1901, got her name placed on the *khata* as the owner of the property. While she was thus the apparent owner of the property she demanded rent from the first defendant and he paid her rent for the year 1902 and the year 1903. It is for these years that the plaintiffs now seek to recover rent from the first defendant on the ground that Gowri had no authority to receive rent and give a discharge for the same.

At the time that the first defendant paid these rents to Gowri the tenancy was still continuing and he was, therefore, estopped as against Subraya, the nominal lessor, and Subraya's heir Gowri from disputing their right as landlords. He could not have defended a suit for rent brought against him by Gowri.

It is also apparent from the findings of the District Judge that the defendant in making the payment to Gowri was acting in good faith. He had no notice of the plaintiffs' interest in the property. We think that it is a case calling for the application of section 50 of the Transfer of Property Act which runs as follows:—

> No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

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It has been contended on behalf of the plaintiffs that section 50 has no application to a case in which there has not been an assignment by the lessor during the tenancy.

The section, however, is not in terms limited to such cases, and, we think, its language is general enough to cover the case before us. We must therefore hold that the first defendant is not chargeable with the rents sued for, and we therefore confirm the decree of the lower Court and dismiss the suit.

The defendant in the course of the suit raised contentions as to the right of the plaintiff as heir of her brother Ramkrishna and it became necessary to investigate closely the rights of Subraya and Ramkrishna with reference to the property in question. In those contentions the defendant has failed. For these reasons we think that the proper order as to costs will be that each party do bear her or his own costs throughout.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

1908.
October 7.

BAI MANI AND ANOTHER (ORIGINAL PLAINTIFFS—PETITIONERS), APPELLANTS, *v.* KHIMCHAND GOKALDAS (ORIGINAL DEFENDANT 1—OPPONENT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 503, 505 and 588—Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge—Appeal.

A Subordinate Judge recommended to the District Judge that a certain person be appointed receiver and in case of the recommendation not being accepted, the Nazir of his Court should be appointed. The District Judge refused to authorize the Subordinate Judge to appoint either of the persons so recommended.

Against the order of the District Judge an appeal was preferred to the High Court.

* Miscellaneous Appeal No. 16 of 1908.

Held, that no appeal lay. The District Judge's order was passed under section 505 of the Civil Procedure Code (Act XIV of 1882) and not under section 503. It was therefore an order which was not appealable not being specified in the list of orders in section 588.

Birajan Kooer v. *Ram Churn Lall Mahata* (1), followed.

APPEAL against an order passed by W. Baker, District Judge of Surat, in Miscellaneous Application No. 33 of 1908.

One Savaichand Ichhachand died on the 27th July 1902 leaving him surviving a widow Bai Mani and a minor son Khimchand. Bai Mani being an illiterate woman and being unable to manage the property which included a sum of Rs. 23,000 of her minor son, appointed four trustees to manage the property. The name of one of the trustees was Khimchand Gokaldas. Subsequently Bai Mani for herself and as next friend of her minor son brought a suit, No. 35 of 1907, against Khimchand Gokaldas and the other trustees in the Court of the First Class Subordinate Judge of Surat, for an account and for carrying out the trusts under the deed by which the defendants had been appointed trustees. Before the suit came on for hearing Bai Mani applied under section 503 of the Civil Procedure Code (Act XIV of 1882), for the appointment of a receiver. The Subordinate Judge after hearing both the parties nominated defendant Khimchand Gokaldas himself as the receiver and in case of his not consenting to accept the office, appointed the Nazir of his Court to be the receiver and submitted the nomination to the District Judge under section 505 of the Code.

The District Judge declined to make the appointment holding that there was no necessity for the appointment and that "to appoint a receiver is to commit the Court to the view that the plaintiff's interpretation of the document and not the defendant's interpretation is correct."

Against the said order Bai Mani and her minor son appealed.

Setalvad (with *Manubhai Nanabhai* and *N. K. Mehta*) for the appellants (plaintiffs—petitioners).

Branson (with *K. N. Koyaji* and *M. M. Karbhari*) for the respondent (defendant 1—opponent):—We raise a preliminary

(1) (1881) 7 Cal. 719.

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objection that the order of the District Judge is not appealable. The order was passed under section 505 of the Civil Procedure Code and section 588 of the Code does not provide for an appeal against such order.

Setalvad for the appellant:—The governing section is 503 of the Code. It is the substantial section in the Chapter in which it occurs. Section 505 only extends the powers given by section 503 to Subordinate Judges. Looking to the policy of the Code it allows an appeal against an order appointing a receiver. Therefore there is greater reason that an appeal should be allowed against an order refusing to appoint a receiver. Again when an order is passed by a competent Court under section 503 either appointing or refusing to appoint a receiver, an appeal will lie against that order. Necessarily then an appeal will lie from an order refusing to appoint a receiver on the recommendation of the Subordinate Judge under section 505. The District Judge in the present instance really acted under section 503 and the order passed by him is appealable: *Venkatasami* v. *Stridavamma*[1], *Sangappa* v. *Shirbasawa*[2], *Boidya Nath Adya* v. *Makhan Lal Adya*[3], *Khagendra Narain Singh* v. *Shashadhar Jha*[4].

Branson, in reply, referred to *Birajan Kooer* v. *Ram Churn Lall Mahata*[5].

SCOTT, C. J.:—This is an appeal from an order of the District Judge of Surat in Miscellaneous Application No. 33 of 1908 of the District file. That application was one in which the District Judge considered the recommendation of the First Class Subordinate Judge of Surat that the defendant Khimchand should be appointed a receiver in a suit No. 35 of 1907, and, in case of the recommendation not being accepted, that the Nazir of his Court should be appointed.

The District Judge having considered the recommendations refused to authorise the Judge to appoint either of the persons so recommended.

(1) (1886) 10 Mad. 179.
(2) (1899) 24 Bom. 38.
(3) (1890) 17 Cal. 680 at p. 682.
(4) (1904) 31 Cal. 495.
(5) (1881) 7 Cal. 719.

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The application was made to him under the proviso to section 505 of the Civil Procedure Code, and under that section he had power to authorise the Subordinate Judge to appoint one of the persons recommended and he had also power to pass any other order. The order which he decided to pass was to refuse to allow the appointment of any receiver at all.

We are of opinion that that was an order passed under section 505, and not under section 503. It is, therefore, an order which is not appealable not being specified in the list of orders in section 588. We are supported in this conclusion by the decision of *Birajan Kooer* v. *Ram Churn Lall Mahata*[1].

We, therefore, think, that the preliminary objection which has been taken that no appeal lies is a good one, and we dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1881) 7 Cal. 719.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Heaton.

PUTLABAI KOM SADASHIV (ORIGINAL DEFENDANT), APPELLANT, *v.* MAHADU VALAD SADASHIV (ORIGINAL PLAINTIFF), RESPONDENT.*

1908. *October* 9.

Hindu widow—Gift of a son by first husband in adoption by widow after her re-marriage—Hindu Widow Re-marriage Act (XV of 1856), sections 2, 3, 4 and 5.

According to the texts the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Assuming that the mother has by Hindu Law a right to give her son in adoption the Hindu Widow Re-marriage Act (XV of 1856) does not afford any indication that the legislature intended to deprive her of it.

The right of guardianship, which under the provisions of Act XV of 1856, section 3, may, under certain conditions, be transferred from the mother to one of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

Panchappa v. *Sanganbasawa* [1], considered.

* Second Appeal No. 205 of 1907.

(1) (1899) 24 Bom. 89.

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APPEAL against the decision of Pandurang Shridhar Pathak, First Class Subordinate Judge of Dhulia in the Khándesh District, in Suit No. 467 of 1907.

The plaintiff, who was a minor represented by his next friend Vithal Naroba Shimpi, sued for a declaration that he was the legally adopted son of his maternal grandfather Sadashiv and for a perpetual injunction restraining the defendant from doing any acts prejudicial to the plaintiff's interest and inconsistent with his rights of ownership over Sadashiv's property. The plaintiff alleged that his natural mother Bhagi was the only child of Sadashiv and that she and her husband Anna lived with Sadashiv and the plaintiff was born in Sadashiv's house, that Sadashiv brought up the plaintiff as his son after obtaining the consent of the plaintiff's parents for his adoption, that the plaintiff's father had authorized before his death his wife, that is plaintiff's mother, to perform the ceremony of adoption whenever Sadashiv wished to do so, that after Sadashiv's death his divided brother Balu having laid claim to his property, the claim was resisted by Putli who was the fourth wife of Sadashiv, that the litigation between them went up to the High Court and Putli succeeded in securing the property from Balu, that the plaintiff was adopted by Putli as son to Sadashiv on the 21st April 1906 under a registered deed of adoption and he was given in adoption by his mother Bhagi and that Putli having subsequently denied the legality of the plaintiff's adoption, he brought the present suit.

The defendant having failed to file a written statement, she was examined by the Court and she made a statement denying the *factum* of adoption and the execution of the deed of adoption. At the hearing it was contended on her behalf that though the plaintiff's adoption was proved, it was illegal inasmuch as the plaintiff's mother Bhagi had re-married a second husband before the adoption, the plaintiff was at the time of the adoption an orphan and so incapable of being taken or given in adoption.

The Subordinate Judge found that the plaintiff was adopted by the defendant and the adoption was legal, that the deed of adoption was proved and that the plaintiff was entitled to the reliefs claimed. He, therefore, made a declaration that

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the minor plaintiff was the legally adopted son of Sadashiv and granted a perpetual injunction prohibiting and restraining the defendant from doing any act in connection with her husband's estate that would in any way interfere with the plaintiff's right as the adopted son of the deceased Sadashiv. In his judgment the Subordinate Judge made the following observations :—

I shall now address myself to the consideration of the contention seriously pressed by Mr. Chandorkar for the defence. His contention is that, although the adoption is proved, it is illegal inasmuch as the boy—the plaintiff—was an orphan at the date of the adoption and so incapable of being legally taken or given in adoption. In connection with this argument it must be borne in mind that the natural mother of the plaintiff had contracted a *mohotur* or *pát* marriage with Vithal before she gave the plaintiff in adoption to the defendant. It is argued that by her re-marriage Bhagi lost all her rights in her late husband's (*i.e.*, plaintiff's natural father's) family and had consequently no disposing power left in her and the minor plaintiff must be treated as an orphan. The Hindu Law as well as the Statute Law (Act XV of 1856, sections 2 and 3) bearing on the point have been discussed by the Bombay High Court in *Panchappa* v *Sanganbasawa* (I. L. R. 24 Bom., p. 89) wherein earlier authorities on the same question have all been considered. It is held by the High Court that a Hindu widow has no power—after her re-marriage—to give in adoption her son by her first husband, unless he has expressly authorized her to do so. It is remarked by Ranade, J., at page 94 that if "she (Hindu widow) cannot take in adoption she cannot for the same reason give a son in adoption after re-marriage. It is true section 5 of the Act reserves to the widow certain rights of inheritance not covered by the exceptions in clauses 2, 3 and 4. It cannot, however, be contended that the right of giving a son in adoption is of the nature of a right reserved to her by section 5. It is a right subordinate to the right of inheritance from her husband and the guardianship of her sons, both of which rights are excepted by name in sections 2 and 3 of the Act..... The right to give a boy in adoption is a right of disposition, a portion of *patrix potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, and, being a part of the rights and interests she acquires as a widow, it is included within the provisions of sections 2 and 3 of the Act, and is not a reservation which the Act concedes to the widow." The adoption of the plaintiff would, no doubt, be illegal on the authority of this case. The case under consideration is, however, distinguishable from the one quoted above in two or more important particulars. In the first place there is evidence in the case to show that Bhagi was authorized by her first husband Nana (Anna?) to give the boy in adoption. The authority is, no doubt, not in writing; but as already remarked I am not prepared to disbelieve the oral evidence on the point. It is the evidence of Bhagi herself. In the second place, it seems quite clear from the evidence furnished by extracts from the school registers that the boy was

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treated by Sadashiv himself as his son as long since as 1901, *i. e.*, long before the death of plaintiff's natural father Narayan (Anna?). Thirdly in Panchappa's case the adoption was disputed, not by the person who made the adoption as is the case in the present case, but by the sister of the person to whom the adoption was made. In this case it was the defendant who made the adoption under competent legal advice. She is in my opinion legally estopped from disputing the validity or legality of the adoption. The reversioners of the deceased Sadashiv may do so, but the defendant cannot. Fourthly, it must be noted that, even apart from adoption, it is the plaintiff who is the legal heir of the deceased Sadashiv and is as much entitled to inherit his estate, unless of course the defendant made a valid adoption, in which the inheritance would go to the boy adopted. However, as I hold that Bhagi had authority from her first husband to give the boy in adoption, and that the adoption is therefore legal and valid, the contingency of second adoption by the defendant cannot arise.

The defendant appealed.

M. V. Bhat for the appellant (defendant):—We do not contest the *factum* of adoption but we impeach it as illegal. The plaintiff's mother Bhagi had taken a second husband before his adoption by the defendant. Therefore at the time of the adoption the plaintiff was an orphan. At that time Bhagi was no longer the widow of the plaintiff's father. By her second marriage she lost all her rights in the first husband's family and had consequently no disposing power left in her in that family. Three things are essential to a valid adoption, namely (1) the capacity to take in adoption, (2) the capacity to give in adoption and (3) the capacity to be validly taken in adoption, that is, the capacity of the adoptive mother to take, the capacity of the natural mother to give and the capacity of the boy to be adopted. The Hindu Law as well as the Statute Law, namely, the Hindu Widow Remarriage Act and earlier authorities bearing on the point involved in the present case have been fully discussed in *Panchappa* v. *Sanganbasawa*[1] and the observations of Ranade, J., fully support our contention. Owing to Bhagi's re-marriage she ceased to be the widow of her first husband and so far as the plaintiff was concerned, she became a mother civilly dead. Therefore there was no capacity in her to give the plaintiff in adoption when he was adopted by Putli.

(1) (1899) 24 Bom. 89.

S. R. Gokhale for the respondent (plaintiff):—The *factum* of adoption being admitted, the only important question to be considered is whether the plaintiff's adoption was, as held by the lower Court, legal. First of all the evidence in the case clearly shows that the plaintiff's mother Bhagi was authorized by her first husband, that is, the plaintiff's father, to give the plaintiff in adoption to Sadashiv and that Sadashiv all along treated the plaintiff as his son. Only the ceremony of adoption was not performed during Sadashiv's life-time and it was performed subsequently by his widow. It is true that at the time of the adoption Bhagi, plaintiff's mother, had taken a second husband but by her re-marriage she did not cease to be the plaintiff's mother and that being so, she as mother had full authority to give the plaintiff in adoption to Putli. The Hindu Widow Re-marriage Act disqualifies a re-married woman from claiming certain rights in her first husband's family, but it does not affect blood relationship. It has been held that a re-married woman is entitled to succeed as heir to her son by the first husband: *Chamar Haru* v. *Kashi*[1]; *Basappa* v. *Rayava*[2].

Certain observations of Ranade, J., in *Panchappa* v. *Sanganbasawa*[3] were relied on for the appellant, but the point involved in that case was similar to the one now under consideration and it was therein held that the adoption was invalid for absence of authority from the first husband, while such authority has been proved in the present case. Therefore that ruling supports our contention.

It has been held that conversion to Mahomedanism does not debar the convert father from sanctioning the adoption of his Hindu son: *Shamsing* v. *Santabai*[4]. Though such a convert cannot himself go through the ceremony of giving the son in adoption, he can sanction the adoption and get the ceremony performed by some one else. Therefore giving the plaintiff in adoption by Bhagi being sanctioned by her first husband, the act of giving was merely a continuation of the sanction.

Bhat in reply.

(1) (1902) 26 Bom. 388.
(2) (1904) 29 Bom. 91.
(3) (1899) 24 Bom. 89.
(4) (1901) 25 Bom. 551.

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PUTLABAI v. MAHADU.

SCOTT, C. J. :—The question in this appeal is whether the plaintiff has been validly adopted as a son to his deceased maternal grandfather Sadashiv. The question has been answered in the affirmative in the lower Court.

The material facts are as follow :—

The plaintiff is the natural son of Anna and Bhagi. Bhagi is the daughter of Sadashiv. Anna, Bhagi and the plaintiff lived with Sadashiv. Bhagi says that her father intended from the first to adopt the plaintiff, that her husband asked him to do so and when attacked with plague told Sadashiv that the boy was given to him. This story is highly probable for Sadashiv was a well-to-do man possessed of property worth Rs. 25,000 or 30,000 while Anna had no property whatever. At intervals of a few months the deaths occurred of, first, Anna, then, Sadashiv and lastly, Bhowani, Bhagi's mother. Sadashiv had another wife Putli, the defendant in this suit. After Sadashiv's death Putli and Bhagi and the plaintiff lived together in Sadashiv's house until they were driven out by Balu, the divided brother of Sadashiv. Balu's action led to litigation between him and Putli in which Putli eventually secured from him all Sadashiv's property. For about 3 years Putli continued to treat the plaintiff as before as the son of Sadashiv. She also in April 1906 went through a formal adoption ceremony in which the plaintiff was given by Bhagi and taken by Putli as son to Sadashiv. A deed of adoption was then executed by Putli in the plaintiff's favour.

At this time Bhagi was no longer the widow of Anna having re-married about a year previously. In August 1906 previously Putli denied the validity of the adoption and this suit was then filed on behalf of the plaintiff to establish it.

The plaintiff's adoption is challenged by the defendant on the ground that he was owing to his mother's re-marriage an orphan in the eye of the law at the time of the adoption ceremony, without any parent capable of giving him in adoption.

We will first consider the right of a mother to give her son in adoption according to the Hindu Law.

According to the texts the right of the female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Thus Manu IX 168 'that (boy) equal by caste whom his mother or his father affectionately gives with water in time of distress as son must be considered as an adopted son'.

Yajnavalkya II 130 'the son whom his father or mother gives becomes Dattaka.' Vashista XV, 1, 2 'man formed of uterine blood and virile seed proceeds from his mother and his father as effect from cause, therefore the father and the mother have power to give, to sell and to abandon their sons.' The Mitakshara which is the paramount authority in that part of the country to which the parties belong has the following comment—Bk. 1, Section XI, 9 and 10:—'9. He who is given by his mother with her husband's consent while her husband is absent or incapable though present or without his assent after her husband's decease or who is given by his father or by both being of the same class with the person to whom he is given becomes his given son; so Manu declares "He is called a son given whom his father or mother affectionately gives as a son being alike by class and in a time of distress confirming the gift with water." 10. By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver, not the taker.'

Thus apart from the effect of special legislation which we will next consider, the maternal relationship of Bhagi justified the gift in adoption.

In Mandlik's Hindu Law p. 468 we find the following passage which accords with the conclusion at which we have arrived. "The widow's power of giving in her own right has, by some, been questioned, but, as it seems to me, on very insufficient grounds. In point of fact, even the texts by themselves are more clearly in favour of her competency to give, than her ability to take, and all the Digests held authoritative on this side of India, are equally pronounced in her favour. Nanda Pandita himself, though he would wish for permission for a widow to take, is obliged to hold that Manu's text being express in favour of the mother or the father being able to give, the widow has the right to give."

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It has however been argued before us that the effect of the Hindu Widow Re-marriage Act XV of 1856 is to deprive a re-married widow of all rights resulting from her first marriage and even of the right to act as guardian of her child. We are unable to agree with this contention.

Section 3 of the Act is as follows:—

On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother:

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

It is to be observed first that the proviso preserves the right of the re-married mother to the guardianship of her children when they have no property of their own even from the interference of the Court except in cases where a grandfather or grandmother or male relative of the dead father has given security for the support and education of the children: secondly that even where there is a property of the children the Court has a discretion to refuse the application for the removal of the children from the guardianship of the mother.

Her right as mother to act as guardian of children not possessed of property is therefore but slightly affected by the Act.

Assuming that the mother has by Hindu Law a right to give her son in adoption, we do not think that the Act affords any indication that the legislature intended to deprive her of it.

Section 5 says that a widow, except as in the three preceding sections is provided, shall not by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled. Accordingly a re-married woman has been held entitled to succeed as heir to her son by her first husband: see *Chamar Haru* v. *Kashi*[1] and *Basappa* v. *Rayava*[2].

The right of guardianship which under the provisions of section 3 (one of the sections excepted in section 5) may under certain conditions be transferred from the mother to one of the other relations of the child does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

It is however contended that the matter is not open to argument because it has been held by a Bench of this Court in *Panchappa* v. *Sanganbasawa*[3] that a Hindu widow has no power after her re-marriage to give in adoption her son by her first husband unless he has expressly authorised her to do so. These are the terms of the head note and appear to express the opinion of Parsons, J., one of the Judges who decided that case.

In our opinion the evidence to which we have referred in the earlier part of the judgment is good evidence of an express authority from Anna to Bhagi to give the plaintiff in adoption to Sadashiv. The adoption would therefore according to the opinion of Parsons, J., be valid.

For the above reasons we dismiss the appeal with costs.

Appeal dismissed with costs.

G. B. R.

(1) (1902) 26 Bom. 388.

(2) (1904) 29 Bom. 91.

(3) (1899) 24 Bom. 89.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

1908. *October* 15.

ADAM UMAR SALE (ORIGINAL DEFENDANT NO. 1), APPELLANT, *v.* BAPU BAWAJI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 2—8), RESPONDENTS.*

Bhagdari Act (Bombay Act V of 1862), sec. 3—Bhag—Unrecognised subdivision of a bhag—Alienation—Suit to set aside the alienation—Limitation.

Possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act (Bombay Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest.

The Bhagdari Act (Bombay Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

Dala v. *Parag*(1) and *Jethabhai* v. *Nathabhai*(2), distinguished.

SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Broach, confirming the decree passed by K. V. Desai, Subordinate Judge of Broach.

Suit to recover possession of land.

The piece of land in dispute formed an unrecognised subdivision of a *bhag*. The ancestors of the plaintiff sold it to the ancestors of defendants Nos. 1, 2 and 3 in the year 1863, that is, after the introduction of the Bombay Bhagdari Act in 1862. The sale was opposed to the spirit of section 3 of the Act.

The plaintiff filed this suit in 1905, to recover the possession of the land from the defendants, alleging that the sale having been void under section 3 of the Act could confer no right or title on the defendants.

The Subordinate Judge decreed the plaintiff's claim. It was upheld on appeal by the District Judge on grounds which he stated as follows :—

As to the plea of adverse possession, it is to be observed that the defendants raised no such issue in the lower Court. The plaint itself no doubt states that

* Second Appeal No. 112 of 1908.

(1) (1902) 4 Bom. L. R. 797. (2) (1904) 28 Bom. 399 ; 6 Bom. L. R. 428.

defendant No. 1 has been in the possession since the sale, that is considerably over twelve years prior to the suit. But there is no clear issue nor evidence as to how far this possession was adverse to plaintiff, apart from any presumption that may be made from plaintiff's ancestor being one of the vendors.

Further, it is now settled law that adverse possession for however long a period is no bar to ejectment by the Collector under section 3 of the Bhagdari Act: *Collector of Broach* v. *Rajaram*, I. L. R. 7 Bom. 542, 546; *Bai Dala* v. *Parag*, 4 Bom. L. R. 797; *Jethabhai* v. *Nathabhai*, I. L. R. 28 Bom. 399.

But the English rule 'Prescription runneth not against the Crown' does not hold good in India; in point of limitation, except where specially protected by law, the Crown and its officers stand on the same footing as any other parties.

There is no such special exemption in the Bhagdari Act: the words 'whenever he shall, upon due inquiry' &c., can hardly be said to extend the period of limitation. In the cases cited above, the *ratio decidendi* was really the fact that the legislature for special reasons of policy, had absolutely made illegal and invalid *ab initio* all alienations of unrecognised sub-divisions; so that possession under such alienations by a stranger non-bhagdar could never by mere lapse of time be recognised by the Courts as legal possession. If so, there seems no clear reason why the plaintiff instead of moving the Collector to take action and, if action were taken in his favour, of leaving the appellant to apply to the Court to set aside the Collector's order should not himself directly apply to the Court to reinstate him in possession; or, when he so applies, why possession of itself should bar his remedy direct any more than it does so indirectly through the Collector. The point of adverse possession cannot thus really arise in the case. To use the words of Chandavarkar, J., in *Jethabhai* v. *Nathabhai*, I. L. R. 28 Bom. 407: 'It is of the essence of adverse possession that it must relate to some property which is recognised by law. But here there is no such property, since the legislature has proscribed the kind of property on which the plaintiffs seek to found their title by adverse possession.' In respect of the resulting hardship, if any, to defendants, one can but quote the words of Jenkins, C. J., in *Dala* v. *Parag* (4 Bom. L. R. 799): 'Great hardship may possibly arise from time to time by the exercise of those powers, but this is not an unfrequent result of legislation of this class and we cannot on this ground help the plaintiff, for "Courts must look at hardships in the face rather than break down rules of law".'

L. A. Shah, for the appellant (defendant No. 1):—It has been found as a fact that the sale took place in the year 1863 A. D., and ever since the possession has been with the defendant. The present suit, which is brought more than forty years after that date, is therefore time-barred (see section 28 and Article 144 of the Limitation Act), unless there is something in the Bhagdari Act (Bombay Act V of 1862) to exclude the operation of the provisions of the Limitation Act, 1877.

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We submit there is nothing in the Bhagdari Act, 1862, to exclude the operation. The cases of *Dala* v. *Parag*[1] and *Jethabhai* v. *Nathabhai*[2] are distinguishable from the present case inasmuch as there the Collector had initiated the proceedings and the question was whether his action was subject to any provisions of the Limitation Act, 1877. In the case of *The Collector of Broach* v. *Desai Raghunath*[3], the proceedings were under section 2 of the Bhagdari Act (Bombay Act V of 1862). In *Dala* v. *Parag*[1] the learned Chief Justice relied upon the expression "whenever it shall appear" in section 3 of the Bhagdari Act, and held that the plea of adverse possession could not prevail against the Collector's order. In the case of *Jethabhai* v. *Nathabhai*[2] also the Collector had passed the order and the plaintiff was seeking to get rid of the effect of that order. The general remarks of Chandavarkar, J., must be taken with reference to the facts of the case, the point arising in this appeal not having been argued in that case.

G. N. Thakore (for *M. N. Mehta*), for the respondent:—The Limitation Act does not control the transactions in question in contravention of the Bhagdari Act: see *The Collector of Broach* v. *Desai Raghunath*[3], where the Collector's action fell under section 2 of the Bhagdari Act. In *Dala* v. *Parag*[1] and *Jethabhai* v. *Nathabhai*[2] the Collector's action fell under section 3 of the Act. These cases are not distinguishable from the present case on the ground that the Collector's action intervened in each of them, while in the present case there is no order of the Collector. Besides, the remarks of Chandavarkar, J., which form part of the decision of the case, are clearly in favour of the view that the policy of the Act is to make the transaction contravening its provisions unlawful, and null and void in law. I strongly rely on the said remarks.

BATCHELOR, J.:—This appeal raises a question as to the construction of the Bhagdari Act (Bombay Act V of 1862). The plaintiff sued to recover possession of a parcel of land alleging that it formed part of a *bhag* which was his ancestral property,

(1) (1902) 4 Bom. L. R. 797. (2) (1904) 28 Bom. 399 : 6 Bom. L. R. 428.
(3) (1883) 7 Bom. 546.

and that in 1863 it and some other land were sold, in contravention of the Bhagdari Act, by his ancestors and those of defendants 4 and 5 to the ancestors of others of the defendants. It is admitted that the land in suit is an unrecognised sub-division of a *bhag*, and it is found as a fact by the Court below that the sale to the defendants' predecessors took place in 1863, that is, after the coming into force of the Bhagdari Act.

The learned District Judge has allowed the plaintiff's claim on the grounds that the sale of 1863 was void under section 3 of the Bhagdari Act, and that no adverse possession of the land could be acquired by the first defendant so as to bar the suit under the law of limitation. Though other questions have been slightly discussed before us on behalf of the first defendant, who is the appellant here, it appears to me that the only point of substance is that which has reference to the Limitation Act. It is common ground that the sale of 1863 was void under section 3 of the Bhagdari Act, and upon a consideration of the pleadings and the general conduct of the suit I am satisfied that the suit must be held to be barred by limitation unless it can be saved by virtue of the special provisions of the Bhagdari Act. Though no issue as to limitation was raised in the trying Court, the point was taken in the first defendant's written statement, and has been discussed by the Judge below; having regard to these circumstances and to section 4 of the Limitation Act, I think that Mr. Shah is entitled to argue the question of limitation in this appeal.

Now the argument which found favour with the lower appeal Court, and which accordingly the appellant has now to displace, is that possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act can never become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest. This argument is grounded upon the general scheme and policy of the Act, and upon certain judicial decisions.

As to the scheme of the Act, it is apparent from the title, the preamble and the sections that the Act is a special or exceptional piece of legislation designed with the view to prevent the dismemberment of Bhagdari tenures. To give effect to this policy

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the legislature directs in section 1 of the Act that no portion of a *bhag*, other than a recognised sub-division of such *bhag*, shall be liable to seizure under the process of any Civil Court. Then by section 2 it is provided that on the issue of any such process for the seizure of any unrecognised portion of a *bhag*, the Collector may move the Court to set aside the process, and if the Court finds that the case falls within the Act, "it shall set aside or quash such process, and cause the provisions of this Act to be put in force." Then follows section 3, with which we are more immediately concerned in this appeal. It begins by reciting that "it shall not be lawful" to alienate or incumber any portion of a *bhag* other than a recognised sub-division of such *bhag*; and the second paragraph enacts that any alienation contrary to the provisions of the section "shall be null and void; and it shall be lawful for the Collector ..... whenever he shall, upon due inquiry, find that any person is in possession of any portion of any *bhag* ..... other than a recognised sub-division of such *bhag* in violation of any of the provisions of this section, summarily to remove him from such possession, and to restore the possession to the person whom the Collector shall deem to be entitled thereto." Then by the third paragraph it is laid down that any suit brought to try the validity of any order made by the Collector in the exercise of the above powers must be brought within three months after the execution of such order.

It has been held by this Court in decisions which are binding upon us that under section 3 of the Act the Collector may take action at any time; that his action is not subject to the law of limitation; and that the plea of adverse possession cannot prevail against any order which he may make: see *Dala* v. *Parag*[1] and *Jethabhai* v. *Nathabhai*[2]. A reference to the former case will show how this principle is deduced from the general scheme of the Act and from the particular words authorising the Collector to take action whenever he shall find any person in apparently unlawful possession. But in this case no action has been taken by the Collector. It is the plaintiff himself who now seeks to disturb a possession extending over 40 years; and the question

(1) (1902) 4 Bom. L. R. 797. (2) (1904) 28 Bom. 399: 6 Bom. L. R. 428.

is whether the immunity from limitation, afforded to the Collector under the Act, should be extended also to a private party. I can find no warrant in the Act for that opinion; on the contrary, the policy of the Act, as I read the sections which I have endeavoured to summarise, is to vest in the Collector alone the special powers of interference conferred, leaving private parties to the operation of the ordinary law. And this view derives support from the consideration that the Collector is in a better position than the Civil Court to carry out the special objects of this particular Act with due regard to the aims of the Government as well as to any equities which may exist between the parties. But there is, I think, nothing to indicate that the exceptional position conferred on the Collector can be acquired by a party who after standing by for 40 years comes direct to the Court instead of availing himself of the special remedy provided by the Act. Reliance was placed by Mr. Thakore upon a passage in Chandavarkar, J.'s judgment in *Jethabhai's* case[1] where it was said that, on principle, such a title as the plaintiff's in that suit claimed to have acquired, could not be acquired by adverse possession. But this passage, as the following sentences clearly show, had reference to the particular claim advanced by the then plaintiffs who professed to hold the land as forming part of a *narva* holding and as subject to all the incidents of the tenure. No such claim is put forward here and the passage is therefore inapplicable to the present facts.

Then it was said that the possession obtained by the first defendant's predecessor was possession obtained through a transaction which the law both prohibits and declares to be null and void. That is undoubtedly so, but it supplies no reason for supposing that such possession would not be adverse to the rightful owner. On the contrary, it is just such possession as this, that is, possession originating without colour of title, which is contemplated by the law of limitation: so, in the *President and Governors of Magdalen Hospital* v. *Knotts*[2] possession obtained under void leases was held to be adverse. It is important to distinguish between the sale and the possession. The sale, no

(1) (1904) 28 Bom. 399: 6 Bom. L. R. 428. (2) (1879) 4 App. Cas. 324.

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ADAM UMAR v. BAPU BAWAJI.

doubt, was void, and the law allowed the vendors ample time in which to have it set aside. But the appellant does not rest upon the sale; he takes his stand on the long possession following the sale, and the effect of that possession is not displaced by reference to its origin. So far as I can discover, the Act contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

For these reasons I am of opinion that the appeal should be allowed and that the suit should be dismissed with costs throughout.

Appeal allowed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907.

December 2.

JAMSHEDJI CURSETJEE TARACHAND, PLAINTIFF, *v.* SOONABAI AND OTHERS, DEFENDANTS.*

Trusts to perform Muktad ceremonies, validity of—Tenets of Zoroastrian faith—Nature and meaning of Muktad ceremonies—Ceremonies tending towards the advancement of religion—Practice—How far decision by single Judge binding on his successors.

Trusts and bequests of lands or money for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktad, Baj, Yejushni, and other like ceremonies, are valid "charitable" bequests, and as such exempt from the application of the rule of law forbidding perpetuities.

The Farvardigan days are the most holy days during the Zoroastrian year and the performance of Muktad ceremonies during the Farvardigan days is enjoined by the Scriptures of the Zoroastrian religion.

The performance of the Muktad ceremonies is a *religious duty* imposed on the Zoroastrians by the proved tenets of the religion they profess.

The ceremonies themselves are acts of religious worship. They include worship, praise, and adoration for the Supreme Deity, and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual, for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well-being and long reign of the sovereign, for

* O. C. J., Suit No. 341 of 1907.

good government by him, and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and there can be no doubt that the performance of these ceremonies is an act of Divine Worship in its highest and truest sense.

The monies paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

According to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator.

A Judge sitting on the original side is bound ordinarily to follow the judgment of another Judge when he has decided a point of law, or laid down certain principles of practice or procedure or judicially construed any provision of the law prevailing in the country. But a single Judge is not bound to follow, another Judge's *findings of fact based on the evidence recorded by him*, when the evidence that may be available before a Judge in a later case may be fuller or more reliable and may tend to lead him to a different conclusion.

Limji Nowroji Banaji v. *Bapuji Ruttonji Limbuwalla*[1], not followed.

DINBAI, widow of Jehangir Cursetji Likimna, otherwise known as Tarachand, a Parsee, on the 21st day of December 1871 made a settlement of certain moveable and immoveable properties belonging to her, and appointed her sons Cursetji Jehangir Tarachand and Merwanji Jehangir Tarachand and her son-in-law Sorabji Hormusji Bottlewala, all since deceased, the trustees thereof. The deed of settlement provided *inter alia* that the trustees and the survivors or survivor of them and the executors and administrators of such survivors should stand possessed of and interested in all the immoveable and moveable properties therein more particularly mentioned and thereby settled upon certain trusts, that is to say, "in trust to receive the interest and income thereof and to pay the same to Dinbai during her life, and after her death upon trust to purchase or set apart out of the

(1) (1887) 11 Bom. 441.

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said trust funds promissory notes of the Government of India for the sum of Rs. 15,000 bearing interest at 4 per cent. per annum and to pay the annual income thereof to each of them the said Cursetji Jehangir Tarachand, Merwanji Jehangir Tarachand and Hormusji Sorabji Bottlewal la and after the death of any of them to his or their executors or administrators alternately in regular rotation every third year in the order named above to enable him or them to defray the expenses of annual Muktad ceremonies of the dead members of the family in both sects of Shanshaya and Kadmi".

The deed of settlement made provision for the payment of certain sums of money to the persons and for the purposes therein mentioned and then proceeded "and to pay and divide the net residue thereof unto and between the said Cursetji Jehangir Tarachand and Merwanji Jehangir Tarachand, their executors, administrators and assigns in equal shares".

Cursetji Jehangir Tarachand died on the 15th of December 1887 at Bombay leaving a will, dated the 17th January 1887, whereby he appointed his wife Bai Meherbai Cursetji Tarachand the sole executrix thereof. As this will was after the death of the testator lost or mislaid, the High Court of Bombay granted on the 15th March 1888 probate of the draft thereof to Bai Meherbai until the original will was produced.

Bai Meherbai died at Bombay on the 16th February 1900 without fully administering the assets belonging to the estate of Cursetji Jehangir Tarachand. On the 3rd August 1900 letters of administration with the said draft will annexed of the un-administered property, property and credits of Cursetji Jehangir Tarachand were granted by the High Court at Bombay to the plaintiff as one of the sons and one of the two surviving residuary legatees named in the will of the said deceased limited until the original will was produced.

The settlor Bai Dinbai died on the 5th March 1889. At the time of her death Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachand were living and after her death they continued to manage the moveable and immoveable properties mentioned in the deed of settlement. In the course of such management they, in pursuance of the terms of the settlement,

set apart out of the trust-properties in their hands Government promissory notes of the value of Rs. 15,000 for the purposes of the Muktad ceremonies in the settlement directed to be performed.

Bai Dinbai left a will dated 15th July 1886 whereby she appointed the said Cursetji Jehangir Tarachand, Merwanji Jehangir Tarachand and Sorabji Hormusji Bottlewalla executors. As the said Cursetji had predecesed the executrix the will was proved by the surviving executors on the 18th May 1899. After the death of Bai Dinbai, the said Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachand, as the surviving trustees of the settlement, went on paying the interest of the said Government promissory notes of Rs. 15,000, alternately each year to (1) Bai Meherbai, the executrix of the will of Cursetji Jehangir Tarachand, until her death in the year 1900 and after that with the implied consent of the plaintiff as administrator to Bai Ratanbai, the eldest daughter of Cursetji Jehangir Tarachand; (2) to Sorabji Hormusji Bottlewalla until his death, which took place on the 31st August 1902, and after his death to his executors; and (3) to Merwanji Jehangir Tarachand until his death, which took place on 15th March 1905.

Since the death of Merwanji Jehangir Tarachand his executors, who held the said Government promissory notes, have not paid the income thereof to any one, as they entertained doubts as to the validity of the trust declared in respect of the said notes.

About the end of the year 1890 the whole of the estate of Bai Dinbai was administered and the whole trust properties under the deed of settlement were properly distributed, except the Government promissory notes which were set apart according to the deed of settlement. By an Indenture dated 16th April 1891, Merwanji Jehangir Tarachand, Meherbai, widow and executrix of Cursetji Jehangir Tarachand, and the 3rd, 4th, 5th, 6th, 7th, 8th, 9th defendants hereto passed a release in favour of Merwanji Jehangir Tarachand and Sorabji Hormusji Bottlewalla, the executors and trustees abovenamed, with the proviso at the end thereof excluding the Government promissory notes of Rs. 15,000 from the operation of the release, in the event of the trusts being found or declared to be inoperative or void.

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The 1st and 2nd defendants were the executrix and executor, respectively, of the last will and testament of Merwanji Jehangir Tarachand. The 3rd, 4th and 5th defendants were the daughters of Bai Maneckbai, the eldest daughter of the deceased settlor Bai Dinbai. Defendants 6, 7, 8, and 9 were the daughters of Bai Bachubai, the youngest daughter of Bai Dinbai. Defendants 10 and 11 were the surviving executors of the last will and testament of Sorabji Hormusji Bottlewalla. The 12th defendant was the Advocate General.

The plaintiff therefore filed this suit and obtained an originating summons on the 18th April 1907 for the determination of the following questions:—

(1) Whether the trusts declared in respect of Government promissory notes for Rs. 15,000 mentioned in the plaint are valid?

(2) If the trusts abovenamed are valid, who are the persons entitled to get the interest on the said notes and to perform the Muktad ceremonies?

(3) If the trusts abovenamed are void, who are the persons entitled to the Government promissory notes for Rs. 15,000 and the interest which has accrued and will accrue due thereon.

(4) Whether the agreement embodied in the release of the 16th December 1891 and referred to in paragraph 12 of the plaint is not binding on all the parties hereto?

(5) Whether in the event of the said trusts being held to be void the first and second defendants herein are not liable to account for the promissory notes of Rs. 15,000 and the interest thereon?

J. K. Tarachand, for the plaintiff.

Kanga, for defendants 1 and 2.

Bahadurji, for defendants 10 and 11.

The summons was argued in chambers on 29th June 1907, when the learned Judge (Davar, J.) adjourned it into Court for further evidence and argument and made the Advocate General a party.

J. K. Tarachand, for the plaintiff:—Muktad ceremonies are ceremonies for the benefit of the dead. I refer the Court to the following cases:—

Limji Nowroji Banaji v. *Bapuji Ruttonji Limbuwalla*(1); *Cowasji N. Pochkhanawalla* v. *R. D. Setna*(2); *Dhunbaiji* v. *Nawroji Bomanji*(3); *Cowasji Byramji Gorewalla* v. *Perrozbai*(4); *Maneckji Edulji Allbless* v. *Sir Dinsha Maneckji Petit*(5); *Dadina* v. *The Advocate General*(6). These are all the cases, and they decide that trusts in favour of Muktad ceremonies are void all creating perpetuities.

See also *Dady* v. *Advocate General*(7).

I say that the trust is void on the basis of these cases as offending against the law of perpetuities.

[Davar, J.—Show me that this rule applies to Parsis.]

We must refer to 43 Eliz., ch. 4, to see what bequests are charitable.

Naoroji Beramji v. *Rogers*(8) decides that the rule against perpetuities applies to Parsis.

[Davar, J.—In order to prove your case you must prove that the English law applies to Muktad. The Rule of Perpetuity is English Law; so far as succession goes it may apply to Parsis, but can you say that it applies to foreign religious institutions?]

The common law applies to India and there are certain exceptions with regard to Hindus and Mahomedans, but there is nothing to exempt the Parsis, see *Yeap Cheah Neo* v. *Ong Cheng Neo*(9). This is enough to shift the onus on to the other side. If they allege any custom I shall be allowed to call evidence to contradict that custom.

Kanga, for defendants 1 and 2:—I represent the trustees, the executrix and executor of Merwanji Tarachand. There is no dispute as to the facts, the trustees are willing to carry out the

(1) (1887) 11 Bom. 441.
(2) (1895) 20 Bom. 511.
(3) (Unreported) Suit No. 565 of 1889.
(4) (Unreported) Suit No. 281 of 1892.
(5) (Unreported) Suit No. 96 of 1892.
(6) (Unreported) Suit No. 49 of 1895.
(7) (1905) 7 Bom. L. R. 324.
(8) (1867) 4 Bom. H. C. R. (O. C. J.) 1.
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trust and place themselves in the hands of the Court. The Parsi law has been in an undecided state since the decision of *Naoroji Beramji* v. *Rogers*[1], which applies English law to Parsis. In Bombay Parsis are governed by the Charter, in the Mofussil they are governed by Bombay Regulation IV of 1827. There are four cases in which the English law has not been applied to Parsis. These cases are:—*Dhanjibhai Bomanji* v. *Navazbai*[2] where the law of advancement was held not applicable to Parsis, *Peshotam Hormasji Dastoor* v. *Meherbai*[3] where infant marriage though not valid in English law was held by Scott, J., to be valid among Parsis, *Mithibai* v. *Limji Nowroji Banaji*[4] where Bayley, J., held that the rule in Shelly's case does not apply to Parsis, and *Byramji Bhimjibhai* v. *Jamsetji Nowroji Kapadia*[5]. It is rather difficult to say what is the law and by what law Parsis are governed. Jardine, J., is not supportable when we consider the literature of the community. The Transfer of Property Act makes the Law of Perpetuity applicable to Parsis but not to Hindus and Mahomedans. Section 17 of that Act saves perpetuities for the advancement of religion and charity. In England all religious trusts have been regarded as charitable. There Roman Catholic and other religious trusts were forbidden on some State exigency. Before the Reformation trusts for the souls of the dead were valid, but afterwards they were forbidden as being superstitious: see Statute 1 Ed. VI, Ch. 14. In England no religious trusts have been held void on the ground of perpetuity as being for superstitious purposes or for non-charitable objects.

Jardine, J., relies on *Cocks* v. *Manners*[6], but that case had nothing to do with religion. In the same case there is a bequest to certain sisters of charity and that was held valid. See *Colgan* v. *Administrator-General of Madras*[7]. In England these gifts have been held valid not as religious but as gifts to certain voluntary association.

In *Yeap Cheah Neo* v. *Ong Cheng Neo*[8] it will be seen that the Judge had the idea of superstitious uses in his mind.

(1) (1857) 4 Bom. H. C. R. (O. C. J.) 1.
(2) (1877) 2 Bom. 75.
(3) (1883) 13 Bom. 202.
(4) (1881) 5 Bom. 56.
(5) (1892) 16 Bom. 630.
(6) (1871) L. R. 12 Eq. 574.
(7) (1892) 15 Mad. 424.
(8) (1875) L. R. 6 P. C. 381.

Trusts for masses are valid in Ireland but not in England. There are decisions to say that Judges are not to decide that one religion is better than another, *Mokoond Lal Singh* v. *Nobodip Chunder Singha*[1]. In England trusts can be grouped under the following heads: (1) Forbidden Religious Trusts; (2) Superstitious Religious Trusts; (3) Valid Religious Trusts; (4) Gifts to Voluntary Associations; (5) Trusts for erecting, repairing or maintaining monuments or tombs.

(1) With Forbidden Religious Trusts we are not concerned, for the Proclamation of 1857 gives full liberty of religion.

(2) The doctrine of superstitious uses does not apply to India, *Advocate-General* v. *Vishvanath Atmaram*[2], *1 Ed. VI, Ch. XIV*, only applied to trusts then created. Later trusts are void because of the invalidity due to that Statute. *Dominus Rex* v. *Lady Portington*[3] affords a clue as to what is meant by superstitious uses. *Attorney-General* v. *Calvert*[4] shows that the spirit of that statute was carried on after the Reformation. I rely on four lines at p. 260. On the question of masses the cases are very few, see *West* v. *Shuttleworth*[5], *In re Elliott*[6], *The Attorney-General* v. *The Fishmongers' Company*[7], *In re Fleetwood*[8], *Heath* v. *Chapman*[9], *In re Blundell's Trusts.*[10]. *West* v. *Shuttleworth*[5] and *Heath* v. *Chapman*[9] are doubted by the Master of Rolls in *In re Michel's Trust*[11] and see Snell's Equity, 12th Edition, pages 124-125. *Das Merces* v. *Cones*[12] is an authority showing that the doctrine of superstitious uses is not recognized in India. This is followed in *Andrews* v. *Joakim*[13], see also *Joseph Judah* v. *Aaron Judah*[14], *Khusalchand* v. *Mahadevgiri*[15], *Rupa Jagshet* v. *Krishnaji Govind*[16].

(1) (1898) 25 Cal. 881.
(2) (1895) 1 Bom. H. C. Appx. ix.
(3) (1755) 1 Salkeld 162.
(4) (1857) 23 Beav. 248.
(5) (1835) 2 M & K 684.
(6) (1891) 39 W. R. 297.
(7) (1839) 2 Beav. 151.
(8) (1880) 15 Ch. D. 594.
(9) (1854) 2 Drew. 417.
(10) (1861) 30 Beav. 360.
(11) (1860) 28 Beav. 39.
(12) (1864) 2 Hyde. 65.
(13) (1869) 2 Ben. L. R. (O. C. J.) 148.
(14) (1870) 5 Ben. L. R. (O. C. J.) 433.
(15) (1875) 12 Bom. H. C. R. 214.
(16) (1884) 9 Bom. 169.

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(3) Valid Religious Trusts. These are trusts of Protestants. The cases are *Baker* v. *Sutton*[1], *Townsend* v. *Carus*[2], *Parbati Bibee* v. *Ram Barun Upadhya*[3].

Section 17 of the Transfer of Property Act and 43 Eliz., c. IV, both say that bequests to religion are valid.

A gift: for the maintenance of religious ceremonies is a good gift: *Turner* v. *Ogden*[4]. A legacy towards establishing a Bishop in His Majesty's dominions in America was held good in *Attorney-General* v. *The Bishop of Chester*[5]. In *Attorney-General* v. *Lawes*[6] a direction to pay into a certain bank a yearly sum of £100 for the maintenance and support of the Irvingites was held valid. In *Thornton* v. *Howe*[7] a trust for printing and circulating religious works was held to be valid.

Straus v. *Goldsmid*[8] is a case very like the present case. This decided that a bequest to enable persons professing the Jewish religion to observe its rites is good.

Trusts for all religions are valid charitable trusts provided they are not opposed to morality or positively harmful to the State. An instance of a trust held void as being contrary to the policy of the law is *De Themmines* v. *De Bonneval*[9].

(4) Gifts to Voluntary Associations in perpetuity are not valid, see *Cocks* v. *Manners*[10] which is relied on in *Limji Nowroji* v. *Bapuji Ruttonji Limbuwalla*[11]. If the object of the association is private the trust is bad but where it is public it is good. *Carne* v. *Long*[12] decided that a gift to a public library is not charitable. See the Encyclopœdia of Laws, vol. XI, p. 314, under the head of "Roman Catholic" where all these cases are collected. *Pease* v. *Pattinson*[13] decided that trust for the relief of sufferers by a certain colliery accident is void. In *In re Sheratons Trusts*[14] a bequest to the Sassoon Mechanic Institute was held void.

(1) (1836) 1 Keen 224.
(2) (1844) 3 Hare 257.
(3) (1904) 31 Cal. 895.
(4) (1787) 1 Cox. Eq. C. 316.
(5) (1785) 1 Bro. Ch. Ca. 444.
(6) (1849) 8 Hare 32.
(7) (1862) 31 Beav. 14.
(8) (1837) 8 Sim. 614.
(9) (1828) 5 Russ. 288.
(10) (1871) L. R. 12 Eq. 574.
(11) (1887) 11 Bom. 441.
(12) (1860) 2 De G. F. & J. 75.
(13) (1886) 32 Ch. D. 154.
(14) (1884) W. N. 174.

In re Clark's Trust[1] decided that a bequest in aid of a society for raising funds for the benefit of persons in sickness was void.

The Attorney-General v. *The Haberdasher's Company*[2] relied on by Jardine, J., in *Limbuwalla's* case[3] is more a commercial case than a religious case.

(5) Gifts for erecting, repairing and maintaining tombs are not valid: see Snell's Equity, p. 113 (12th Edition). *In re Rickard*[4] laid down that a bequest of money, the interest of which was to be applied in keeping up the tombs of the testator and his family, is void as a perpetuity. *Hoare* v. *Osborne*[5] decided a gift for the repair of a vault was void. See Shephard, J., in *Colgan* v. *Administrator-General of Madras*[6], *Fisk* v. *Attorney-General*[7], *Fowler* v. *Fowler*[8], *Dawson* v. *Small*[9], Tudor on Charities and Mortmain, Ch. V, section 4, p. 131 (4th Edn.). These bequests are held void because they do not advance religion.

Indian legislation seems to include religious purposes in the word charity. This is borne out by section 17 of the Transfer of Property Act. In the Act VI of 1890, section 2, there is a definition of charity. In Wilson's Mahomedan Law, 2nd Edn., page 393, the distinction between religion and charity is explained. We have to distinguish the three Indian cases. *Colgan* v. *Administrator-General of Madras*[6] is a decision on Masses and proceeds on the principle of *West* v. *Shuttleworth*[10] and is therefore of very little use. As to what is a mass, see *Attorney-General* v. *Delaney*[11]. In *Colgan* v. *Administrator-General of Madras*[6] Shephard, J., was of opinion that trusts for masses should be held valid but he followed *Yeap Cheah Neo* v. *Ong Cheng Neo*[12] and held them void. *Yeap Cheah Neo* v. *Ong Cheng Neo*[12] can be distinguished. The question is are these religious ceremonies pious uses or

(1) (1875) 1 Ch. D. 497.
(2) (1834) 1 My. & K. 420.
(3) (1887) 11 Bom. 441.
(4) (1862) 31 Beav. 244.
(5) (1866) L. R. 1 Eq. 585.
(6) (1892) 15 Mad. 424 at p. 436.
(7) (1867) L. R. 4 Eq. 521.
(8) (1864) 33 Beav. 616.
(9) (1874) L. R. 18 Eq. 114.
(10) (1835) 2 M. & K. 684.
(11) (1875) I. R. 10 C. L. 104 at p. 107.
(12) (1875) L. R. 6 P. C. 381.

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religious uses? In *Limbuwalla's* case[1] they are held to be pious uses.

Bahadurji for defendants 10 and 11, the surviving executors of Sorabji H. Bottlewalla, one of the three trustees of the original deed of settlement:—The suggestion in *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*[1] that Parsis are governed by English law has no authority for its support. All the Judges who decided cases about Baj Rojgar trusts have worked from the Christian point of view and they could not dissociate themselves from the view of the pious ceremonies of the Christian Church. Toleration of religion is the basis of the English Rule here. (1780) 21 George III, ch. 70, sections 17 and 18, said that Courts in India should have regard to the religious usages and customs of the natives of India.

37 George III, ch. 142, section 12, is very similar. 4 George IV, c. 71, High Court Rules, page 13. The policy from the earliest time seems to be to grant entire freedom in respect of religion to the natives of India. Westropp, J., in *Naoroji Beramji* v. *Rogers*[2] says that the Parsis are governed by English law. I submit that law contemplates equality and freedom of religion, see Letters Patent, High Court Rules, page 67, cl. 19. Bombay Regulation IV of 1827, section 26, relates to the mofussil. According to these statutes the Parsis in the mofussil are governed by the law of India as to usage and custom but not the Parsis in Bombay who are governed by the English law, and he has only to step out of the jurisdiction of this Court to establish such a trust as is now in dispute as valid. If a trust does not come within the spirit of 43 Eliz, c. 4, it can be upheld as valid within the jurisdiction of this Court. I propose to cite a series of cases to show that the High Court here has not followed consistently the principle laid down in *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*[1]. Prior cases are the following:—*Ardaseer Cursetjee* v. *Perozeboye*[3] decided that so far as the ecclesiastical side of the Court was concerned the English law did not apply to Parsis. *Homabaee* v. *Punjeabhaee*

(1) (1887) 11 Bom. 441.
(2) (1867) 4 Bom. H. C. R. (O. C. J.) 1.
(3) (1856) 6 Moo. I. A. 348.

Dosabhaee[1], *Modee Kaikhooscrow Hormusjee* v. *Cooverbhaee*[2] laid down that there is the restraint upon the testamentary power of disposition by a Parsee, page 153 of Sorabjee Bengali's book on Parsee Acts. In *Mithibai* v. *Limji Nowroji Banaji*[3] a reference is made to *Gheesta's* case where an illegitimate son was held entitled to succeed to his father's share following the Hindu principle. *Mihiranjee Nuoshirwanjee* v. *Awan Baee*[4] referred to in *Avabai* v. *Jamasji Jamshedji*[5].

There is another case *Mancharsha Ashpandiarji* v. *Kamrunisa Begam*[6] which decided that English law did not apply in its entirety to Parsis; and see Bayley, J.'s judgment in *Jivandas Keshavji* v. *Framji Nanabhai*[7]. *Bai Maneckbai* v. *Bai Merbai*[8] decided that section 7 of the Statute of Frauds applies to Parsis. Fulton, J., in *Navroji Manockji Wadia* v. *Perozbai*[9] and in *Shapurji* v. *Dossabhoy*[10] Batchelor, J., said that the law governing the Parsis in the mofussil is the customary law of the Parsis modified by justice, equity and good conscience.

So far therefore as religion is concerned there is no established Church in India as there is in England and we have here perfect freedom of religion. I mean by "established Church" the Church as established and maintained by the State. The doctrines of the Established Church of England are always the considerations entered into whenever there is a contest on religious matters, but here there is no particular church maintained by the State. See Ilbert's Government of India, pp. 256—259, 53 Geo. III, clause 155, section 33, 3 and 4 Will. IV, ch. 85, sections 92—102 and see also West, J.'s observation in *Fatmabibi* v. *The Advocate-General of Bombay*[11].

As to the cases decided in the Bombay High Court the decree in the case of *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*[12] was practically a consent decree. (Read at p. 447.) The

(1) (1835) 5 Suth. W. R., p. c. 102.
(2) (1856) 6 Moo. I. A. 443.
(3) (1881) 5 Bom. 506.
(4) (1822) 2 Borr. Bom. Rep. 231.
(5) (1866) 3 Bom. H. C. R. (A. C. J.) 113.
(6) (1868) 5 Bom. H. C. R. (A. C. J.) 109 at p. 114.
(7) (1870) 7 Bom. H. C. R. (O. C. J.) 45.
(8) (1881) 6 Bom. 363.
(9) (1898) 23 Bom. 80 at p. 87.
(10) (1905) 30 Bom. 359 at p. 362.
(11) (1881) 6 Bom. 42 at p. 50.
(12) (1887) 11 Bom. 441.

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evidence I shall produce will show that the ceremonies are for the public benefit of all Zoroastrians. Benefit is derived by the whole community. If evidence had been given before Jardine, J., he would have been of the opinion that the bequests were not for the benefit of individuals or of families but of the whole community. In *Wadia's case*[1] there was not contest; it was a friendly suit. *Gorewalla's Case*[2], *Wadia's Case*[1], *Hodiwalla's Case*[3], *Allbless' Case*[4], *Marker's Case*[5], all followed *Limbuwalla's Case*[6]. I refer to the Irish cases for the performance of Masses.

[DAVAR, J.:—I should like to know any case where English law applies to Parsis in respect of religion.]

The Statute of Mortmain does not apply to India; therefore if any question on religion arises it should be judged from the standpoint of the English law prior to the Reformation. See Tudor on Charities and Mortmain, 4th edition, p. 4, 23 Henry VIII Ch. 10, 1 Edward VI Ch. 14, 9 and 10 Vict. Ch. 5, 23 and 24 Vict. Ch. 134, section 1, Theobald on Wills, 6th edition, pp. 350—353. Gifts to perform Masses would be void as being superstitious. See Tudor, p. 8. 9 and 10, Vic. Ch. 59, referred to Jews, 1 Will. and Mary, Chapter 18, referred to Roman Catholics and Dissenters, 2 and 3 Will. IV, Ch. 115 and 23—24 Vic. Ch. 134, section 1 referred to Roman Catholics. A bequest to a Jew to observe the rites of that religion was held valid in *Straus* v. *Goldsmid*[7]. This was before 9 and 10 Vic. 59. *In re Michel's Trust*[8]. If the Parsis are not governed by English law then the rule against perpetuities does not apply so far as religious trusts are concerned. Once the religious liberty is granted then the rule against perpetuities has no application even if such religious trusts are not for the public benefit. If these trusts are for the public benefit then it matters little by what law we are governed, but even if they are not for the public benefit, then as the rule against perpetuities does not

(1) Suit No. 565 of 1889.
(2) Suit No. 281 of 1892.
(3) Suit No. 267 of 1890.
(4) Suit No. 96 of 1892.
(5) Suit No. 49 of 1895.
(6) (1887) 11 Bom. 441.
(7) (1837) 8 Sim. 614.
(8) (1860) 28 Beav. 39

apply the trusts are valid. Hindus and Mahomedans can make private religious trusts which are valid: *Mullick* v. *Mullick*[1], *Juggut Mohini Dossee* v. *Mussumat Sokheemoney Dossee*[2], *Fatmabibi* v. *The Advocate-General of Bombay*[3], *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*[4].

If I establish that the performance of Muktad ceremonies amounts to an act of divine worship, then although if it is a perpetuity the trust would be good. I wish to establish five propositions: (1) The doctrines of the Zoroastrian religion enjoin the performance of Muktad ceremonies. (2) The performance of these Muktad ceremonies amounts to the performance of an act of religious or divine worship. (3) According to the doctrines of the Zoroastrian religion the performance of Muktad ceremonies results in public benefit, either temporal or spiritual, and that it is believed to bring divine blessings not only on the party performing these ceremonies or his household but upon the whole community and on the world at large. (4) Muktad ceremonies, or at all events the essential parts of such ceremonies, can only be performed by priests. (5) Payments received by the priests for the performance of such ceremonies form a portion of their ordinary income and means of livelihood.

A devise to charitable and pious uses generally was held good in *Attorney General* v. *Herrick*[5]. In *Powerscourt* v. *Powerscourt*[6] a devise to trustees to lay out at their discretion 2,000£ "in the service of my Lord and Master." was upheld. *Townsend* v. *Carus*[7] decided that a bequest for spiritual purposes was good. *Farquhar* v. *Darling*[8] upheld a devise "to the poor and the service of God." In *Turner* v. *Ogden*[9] it was held that a bequest for preaching a sermon on Ascension Day, for keeping the chimes of the Church in repair, and for a payment to be made to the singers in the gallery of the Church are all bequests to charitable uses within 43 Eliz.

(1) (1829) 1 Knapp 245.
(2) (1871) 14 Moo. I. A. 289.
(3) (1881) 6 Bom. 42.
(4) (1868) 2 Ben. L. R. (O. C. J.) 11 at p. 47.
(5) (1772) 2 Amb. 712.
(6) (1824) 1 Molloy 616.
(7) (1844) 3 Hare 257.
(8) [1896] 1 Ch. 50.
(9) (1787) 1 Cox. Ch. Cas. 316.

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In *The Commissioners for Special purposes of Income Tax* v. *Pemsel*[1] Lord Macnaghten discussed the meaning of the word charity. Story's Equity, 2nd edition, page 790, section 1155.

Payments made to clergy for the performance of religious services have been held to be good gifts as tending to the advancement of religion: *Robb and Reid* v. *Dorrian*[2]; *Thornber* v. *Wilson*[3].

Trusts for the performance of Muktad ceremonies stand on the same footing as gifts for Masses for two reasons :—(i) All religions in India are on the same footing: *Das Merces* v. *Cones*[4]. This case was followed in *Andrews* v. *Joakim*[5] which decided that a bequest in a will of a sum of money for the performances of Masses in Calcutta was valid. *O'Hanlon* v. *Logue*[6] overruling *Attorney-General* v. *Delaney*[7] decided that a bequest for masses in perpetuity is a good charitable gift, whether there is a direction that the Masses should be celebrated in public or not. (ii) There is no application of the doctrine of superstitious uses in India just as there is no such application in Ireland: *Advocate-General* v. *Vishvanath*[8]; Tudor on Charities and Mortmain 4th edition, page 791, *Attorney-General* v. *Hall*[9].

Prior to the Reformation of 1823 bequests to perform Masses were held valid in England and Ireland, but since 1823 private and public masses were distinguished and bequests for private masses were held to be void. *The Commissioners of Charitable Donations and Bequests* v. *Walsh*[10] decided that trusts for Masses held in public or private were valid trusts. *Attorney-General* v. *Delaney*[7] decided that Masses in public were valid on the ground that they tended to the edification of the congregation but trusts for Masses held in private are void.

Padsha:—This was overruled thirty-one years after by the same Judge in *O'Hanlon* v. *Logue*[6].

(1) [1891] A. C. 531 at p. 583.
(2) (1877) I. R. 11 C. L. 292 at p. 297.
(3) (1855) 3 Drew. 245.
(4) (1864) 2 Hyde. 65 at p. 71.
(5) (1869) 2 Ben. L. R. (O. C. J.) 148.
(6) [1906] 1 I. R. 247.
(7) (1875) I. R. 10 C. L. 104.
(8) (1855) 1 Bom. H. C. Appx. ix.
(9) [1897] 2 I. R. 426 at p. 447.
(10) (1819) Ir. 7 Eq. 34 (note).

The performance of Masses amounts to an act of divine worship which is believed by those belonging to the faith to bring benefits and blessings, spiritual or temporal, to the public at large within the spirit of 43 Eliz. See Palles C. B.'s judgment in *O'Hanlon* v. *Logue*(1) at pages 274-276 and FitzGibbon L. J.'s judgment at page 280 and Holmes L. J. at page 286.

The test is the belief of the testator or settler as to the spiritual or other benefits. This Muktad ceremoney is an act of religious worship which amounts to an act of praise, adoration and thanksgiving involving a petition for benefits both temporal and spiritual on all Zoroastrians and all good people belonging to all other communities, including always a prayer for the ruling Sovereign of the country and for good government by him.

Webb v. *Oldfield*(2) decided that a bequest of perpetual rents of property to two Vegetarian Societies was good. FitzGibbon, L. J., there says that the essential attributes of a legal charity are that it should be unselfish, public, benevolent or philanthropic. *Cross* v. *London Anti-vivisection Society*(3) decided that societies for the suppression and abolition of vivisection are charities. *Yeap Cheah Neo* v. *Ong Cheng Neo*(4) turns upon *West* v. *Shuttleworth*(5); it referred to Penang where there was no native population when the British settled there. In India there was a population whose customs and usages had to be taken into consideration. In *West* v. *Shuttleworth*(5) no evidence of custom was taken; it was decided not on facts but on the English Statutes. See also *Cary* v. *Abbot*(6).

In *Colgan* v. *Administrator-General of Madras*(7) though the Judges say that the law of superstitious uses does not apply to England still they follow *West* v. *Shuttleworth*(5).

As to the ceremonies which are performed during the Muktad days they amount to an act of divine and religious worship and result in benefits to the community and also to the world at large, and I cite passages from the Zoroastrian Scriptures to prove

(1) [1906] 1 I. R. 247.
(2) [1893] 1 I. R. 431.
(3) [1895] 2 Ch. 501.
(4) (1875) L. R. 6 P. C. 381.
(5) (1835) 2 M. & K. 684.
(6) (1802) 7 Ves. 490.
(7) (1892) 15 Mad. 424.

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that Muktad ceremonies are enjoined in the Farvardin Yast which is dedicated to all Furohurs. As to Furohurs see Sacred Books of the East, Vol. 23, page 179. Farvashis are the same as Furohurs. There is a distinction between Fravashi and Ravan: Haugh's Essay on Parsis, 3rd Edition, page 206. (Civilization of the Eastern Iranians in ancient times by Geiger, Vol. 2, page 113; Zarathastra and Zoroastrianism by Rustomji Edulji Dastur Peshotam Sanjana, page 242.) The ceremonies enjoined during the Muktad days are based on paragraphs 49-52 of the Farvardin Yast, see Sacred Books of the East, Vol. 23, page 192. These are the only references as far as Avesta literature is concerned, but there are other references in Pehlvi Dinkard, Vol. 37, Secred Books of East, page 17. There are further references in Bahman Yast (Vol. 5 of Sacred Books of the East, page 208.) That refers to the 11th century A. D. (See also Shayast La-Shayast (what is worthy and what is not worthy to be done), Vol. 5 of Sacred Books of the East, page 351, paragraph 31; Sad Dar Book, Vol. 24 of Sacred Books of the East, page 264, written in the 16th century; Patet Pashemani Spiegle's Avesta, page 157, paragraph 18.)

The next question is what are the usual and essential ceremonies performed on these Muktad days?

According to some people five ceremonies are essential,; according to others these are four: (i) Afringan, (ii) Baj, (iii) Satum, (iv) Farokshi, (v) Yezeshne.

(i) Afringan consists of prayers expressing nothing but praise, adoration and love for the Almighty and the Furohurs. It is divided into three parts: (*a*) Afringan Dibache, the introduction and the most important part because it contains universal prayer and is universally said, (*b*) Afringan proper, (*c*) Afrin or benediction. Of Afringan proper there are in all eleven kinds. Afringan Ardafarvash, Afringan Dahaman, Afringan Surosh, are performed during the Muktad days. Afringan Dahaman is taken from the sixtieth chapter of Yasna.

(ii) Baj ceremonies consist of recitals of chapters 3—8 of Yasna in Vol. 31 of the Sacred Books of the East, pages 207—230. Verses 5, 6, 8, chapter VIII, page 229, are very important.

(iii) Satum, *i. e.*, praise, see Yasna, chapter XXVI, page 278, clauses 1, 2, 5. Mr. Kanga's Khordah Avesta pages 382—391.

(iv) Furrokshi ceremony begins with Satum and the whole of the Farvardin Yast follows: Sacred Books of the East, Vol. 23, pages 179—230. Furrokshi is a ceremony for all the Furohurs. Farvardin Yast is a portion of it and a Yast which is dedicated to all Farohars.

(v) Yezeshne is said to be the highest and most solemn of all the ceremonies performed during the Muktad days and consists of the whole of the Yasna of 72 chapters which includes 17 chapters of Gathas, chapters 3—8 of the Baj, chapter 60 of Afringan, and lastly part of the Satum: see Vol. 31 of Sacred Books of the East, page 195. Yasna and Yezeshne are the same.

As to the application of English law to Parsis I omitted to cite a case important as showing what the Privy Council said. *Rani Bhagwan Kuar* v. *Yogendra Chandra Bose*[1].

Padsha for the Advocate-General:—Trusts for the performance of Muktad ceremonies are not void because of the prohibition on the ground of superstitious uses. As to what are superstitious uses see Bacon's Abridgment, Vol. 1, page 581 (5th edn.), Chapter on Mortmain and Superstitious Uses. Muktad ceremonies have nothing to do with the souls of the dead but with their Furohurs and the Furohurs of the dead. The doctrine of superstitious uses relates only to the souls of the dead and would not apply to Muktad ceremonies even though it were in force in India. Superstitious use is defined in Tudor (edition of 1906), page 4. All religions not subversive to morality are tolerated in India. Dr. Whitley Stokes, Vol. 1, page 390, note to section 105 of Succession Act, says that there is no prohibition in India of what English lawyers call superstitious uses. And at page 839, note 6, he says "In India a trust for what English lawyers call superstitious uses, *e. g.*, saying Masses for the dead, may be valid": *Das Merces* v. *Cones*[2], *Andrews* v. *Joakim*[3], *Advocate-General* v. *Vishvanath*[4],

(1) (1903) L. R. 30 I. A. 249 at pp. 253—255.
(2) (1864) 2 Hyde. 65.
(3) (1869) 2 Ben. L. R. (O. C. J.) 148.
(4) (1855) 1 Bom. H. C. Appx. ix at p. xv.

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Colgan v. *Administrator-General of Madras*[1], followed in *Kaleloola Sahib* v. *Nuseerudeen Sahib*[2], all these cases show that the doctrine of superstitious uses does not apply to India, and if trusts for Masses have not been held valid it is not because of superstitious uses but on the ground of perpetuity. Though it might possibly be held that the English Civil law applied to Parsis as in *Naoroji* v. *Rogers*[3], yet the religious law of England since the Reformation has not been held to apply to India. It was held in *Mitford* v. *Reynolds*[4] and in *Mayor of Lyons* v. *East India Company*[5] that the statutes of Mortmain have not been extended to India. These were followed in *Yeap Cheah Neo* v. *Ong Cheng Neo*[6]. Superstitious uses were created by the Reformation: see Tudor, page 4. Jarman on Wills, Vol. 1, page 163 (5th edn.), 23 Henry VIII, Ch. 10, 1 Edward VI, Ch. 14, *Reg.* v. *Commissioners of Income Tax*[7]. The English Judges followed those statutes and extended their policy. Trusts to say Masses were held to be good religious trusts before the Reformation; see the arguments of Browne, K. C., in *O'Hanlon* v. *Logue*[8] at pages 248—254 and Coke on Lyttleton, Vol. 1, sec. 169 (19th edn.). The rule of perpetuity was in vogue at the time also but still such trusts were held valid. I argue therefore that even if we are governed by the common law of England and apply the same to our religious trusts and even if it is held that our Muktad ceremonies resemble Masses still such trusts according to the common law prevailing in England prior to the Reformation would be held valid.

In re Michel's Trust[9] shows that the English law though it relaxed its severity in other matter still it retained its severity with regard to trusts to say Masses for the repose of the dead.

The question then is what Religious Law would apply to India. *Naoroji* v. *Rogers*[3] lays down that only as to civil rights English law would apply; as to religious trusts whether it is or

(1) (1892) 15 Mad. 424.
(2) (1894) 18 Mad. 201.
(3) (1867) 4 Bom. H. C. R. (O. C. J.) 1.
(4) (1841) 1 Phil. 185.
(5) (1836) 1 Moo. I. A. 175.
(6) (1875) L. R. 6 P. C. 381.
(7) (1888) 22 Q. B. D. 296 at p. 310.
(8) [1906] 1 I. R. 247.
(9) (1860) 28 Beav. 39.

is not good must be decided by a secular judge upon the evidence of witnesses professing the same faith as the settlor or testator. In *Yeap Cheah Neo* v. *Ong Cheng Neo*[1] English law was applied because no evidence as to the customary law of the Chinese was taken. This case was referred to by West, J., in *Fatmabibi* v. *The Advocate-General of Bombay*[2]. In *O'Hanlon* v. *Logue*[3] FitzGibbon, J., says the secular Court must act upon evidence of the belief of the members of the Community concerned. In India all religions stand on an equality [except that Episcopal and Presbyterian Churches have some benefits from the Indian Revenue: 53 Geo. III, Chapter 155, section 33; Ilbert's Government of India, pages 256—259; *Advocate-General* v. *Vishvanath*[4]. The *Lex Loci* applies where the country acquired is inhabited until the Crown or Legislature changes it.

The next point is to show that a religious trust is a charitable trust. In *Baker* v. *Sutton*[5] Lord Langdale M. R. says "all the cases with one exception go to support the proposition that a religious purpose is a charitable purpose". This was followed in *Townsend* v. *Carus*[6], a very important case, and the judgment of the Vice-Chanceller is very instructive. In that case a bequest to trustees to pay monies to certain societies having regard to the glory of God, in the spiritual welfare of his creatures, was held a good religious purpose. *Powerscourt* v. *Powerscourt*[7] cited in *In re Darling*[8] where a gift by will "to the poor and to the service of God" was upheld as a good charitable gift. *Attorney-General* v. *Pearson*[9]; *Commissioners for special purposes of Income Tax* v. *Pemsel*[10].

Muktad ceremonies are acts of religious and divine worship and they also form an important source of remuneration to the priestly class; in other words, they are for the benefit of the Ministers of the Parsi religion. Such a benefit is clearly within the definitions of religious or charitable uses in section 105 of the Indian Succession Act. *Magistrates of Dundee* v. *Presbytery*

(1) (1875) L. R. 6 P. C. 381 at p. 395.
(2) (1881) 6 Bom. 42 at p. 50.
(3) [1906] I I. R. 247 at p. 279.
(4) (1855) 1 Bom. H. C. Appx. ix.
(5) 1836) 1 Keen 224 at p. 233.
(6) (1843) 3 Hare 257.
(7) (1824) 1 Molloy 616.
(8) [1896] 1 Ch. 50.
(9) (1817) 3 Mer. 353.
(10) [1891] A. C. 531.

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of Dundee[1] upheld a gift for the benefit of the ministers of the presbyterian religions of a particular town. In *Grieves* v. *Case*[2] a gift for the mainteanance of preaching ministers was held good. *Middleton* v. *Clitherow*[3], *Gibson* v. *Representative Church Body*[4], Tudor, page 54.

There are two points of resemblences between Muktad and Masses; both are addressed to a large congregation and parts of the ceremony of both can only be performed by priests. The Parsi religion stands on the same footing as the Roman Catholic religion does in Ireland. Therefore the Irish cases are important. I rely on the evidence of the high priests.

J. K. Tarachand for the plaintiff in reply:—The Zoroastrian religion is the religion revealed by God to Zoroaster and then promulgated by him. Interpretations by priests or interested person are not part of the Zoroastrian religion. The Gathas do not say anything about Farvashis. Muktad ceremonies are not religious ceremonies but ceremonies sanctioned by custom which arose after the Farvardin Yast was written which was long after the religion had been revealed to Zoroaster. What is custom is not religion. Section 50 of Farvardin Yast asks for prayers on the Furohurs themselves and not on God or anyone else. (Sacred Books of the East, Vol. 23, page 56, sections 8—11; Vol. III of Khordah Avesta, section 21.) The Muktad ceremonies are not, and were never intended to be, for the benefit of the souls of the dead. This is an erroneous belief and engendered in the minds of the ignorant Parsis by priests for the purpose of putting money into their own pockets. The evidence in *Limbuwalla's* case[5] shows clearly the difference between Furohurs and the souls of the dead (see Jardine, J.'s judgment at page 446). I submit Jardine, J., was right and that he had the proper evidence before him.

In *Allbless'* case[6] the Advocate General did not object to the matter being re-opened. The question is does the English law apply to a perpetual trust for the performance of Muktad cere-

(1) (1861) 4 Macq. 228.
(2) (1792) 4 Bro. Ch. Cas. 67.
(3) (1798) 3 Vesey 734.
(4) (1881) 9 L. R. Ir. 1.
(5) (1887) 11 Bom. 441.
(6) (Unreported) Suit No. 96 of 1892.

monies. *Maclean* v. *Cristall*[1] gives a history of how English law was introduced into India. The Court must decide whether, and what part of, the law applies to this case. The element of public benefit is wanting although it may be a religious trust, although it may be necessary to employ a priest to perform the ceremonies, although it might amount to an act of divine worship, still the trust would be bad in law as offending against the rule of perpetuity: Transfer of Property Act, sections 14—17. There must be present the element of public benefit. If a trust is for the advancement of religion it would be for the public benefit, but every religious trust is not for the public benefit: Queen's Proclamation, Ilbert's Government of India, page 572, *Commissioners for special purposes of Income Tax* v. *Pemsel*[2], *Dolan* v. *Macdermot*[3], *Jeffries* v. *Alexander*[4], *Morice* v. *The Bishop of Durham*[5], *Attorney-General* v. *Delaney*[6], *O'Hanlon* v. *Logue*[7], Tudor on Charities, page 37, *Yeap Cheah Neo* v. *Ong Cheng Neo*[8]. In *Thornton* v. *Howe*[9], *In re Michels' Trust*[10], *Straus* v. *Goldsmid*[11] and *Turner* v. *Ogden*[12], the trusts were for the public benefit. The statute of superstitious uses merely made these existing trusts void and afterwards the Courts would not uphold the trusts of the same nature. The doctrine of superstitious uses made trusts illegal but did not make them non-charitable. If the trusts are illegal but charitable the doctrine of Cypres would apply. I sumbit that the Court is bound by the decision in *Yeap Cheah Neo* v. *Ong Cheng Neo*[8]. *O'Hanlon* v. *Logue*[7] was not a decision of the highest Court of appeal nor were the Judges who decided it unanimous.

I further submit that the trust is impossible of performance because certain objects are unascertainable; therefore the trust is void for uncertainty both as to the ceremonies to be performed and the time at which they are to be performed. The Parsis

(1) (1849) P. O. C., 75 at p. 85.
(2) [1891] A. C. 531.
(3) (1865) L. R. 5 Eq. 60.
(4) (1860) 8 H. L. C. 594 at p. 648.
(5) (1804) 9 Vesey 399 at p. 406 and (1805) 10 Vesey 522 at p. 542.
(6) (1875) I. R. 10 C. L. 104.
(7) [1906] 1 I. R. 247.
(8) (1875) L. R. 6 P. C. 381.
(9) (1862) 31 Beav. 14.
(10) (1860) 28 Beav. 39.
(11) (1837) 8 Sim. 614.
(12) (1787) 1 Cox, Ch. Ca. 316.

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have lost their Calender; according to some, the new year commences in September, others say it commences in August, and others again say it begins on the 21st March. The commencement of the year being unascertainable the last ten days of the year cannot be ascertained. The Farvardin Yast directs that these ceremonies be performed at the end of the Parsi year.

I further say this trust is void as being opposed to public policy. See Sir Charles Farran's notes. The Legislature was approached to make such trusts valid and after due consideration came to the conclusion that these trusts are void by not passing any legislation to disturb the judgments. The Court should therefore uphold these decisions.

DAVAR, J.—Dinbai widow of Jehangir Cursetji Likimna, otherwise known as Tarachund, a member of the Parsi community of Bombay, on the 21st of December 1871 executed an Indenture of Trust whereby she appointed her two sons Kharsetji and Merwanji and her son-in-law Sorabji Hormusji Bottlewalla Trustees and conveyed to them certain immoveable and moveable property belonging to herself upon Trusts which are therein set out. All the three original Trustees are dead. The first defendant is the widow, and executrix of the will, of Merwanji one of the original Trustees. The plaintiff is the son and administrator with the will annexed of the property and credits of his late father Kharsetji who was another original Trustee. Defendants Nos. 10 and 11 are the surviving executors of the will of Sorabji Hormusji Bottlewalla the third Trustee under the Settlement made by Dinbai.

The portion of the Trusts created by Dinbai with which the Court is concerned in this case is in the following terms:—

"In trust to receive the interest and income thereof and to pay to the said Bai Dinbai during her life time and after her death upon trust to purchase or set apart out of the said Trust Funds Promissory Notes of the Government of India for the sum of Rs. Fifteen Thousand bearing interest at the rate of four per centum per annum and to pay the annual income thereof to each of them the said Kharsetji Jehangir Tarachund, Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachund and after the death of any of them to his or their Executors or Administrators alternately in regular rotation every third year in the order named above

to enable him or them to defray the expenses of annual Muktad ceremonies of the dead members of the family in both sects of Shenshai and Cudmees."

Dinbai died on the 6th of March 1889. Previous to her death she executed a will bearing date the 15th of July 1886. By the said will she directed that certain silver utensils which were in her possession and which are used in the performance of the Muktad ceremonies should be kept in trust by her executors and each of the Trustees of the Settlement of 1871 were to be allowed to use the same for the purposes of the Muktad ceremonies. The Executors of the will were the same as the Trustees under the Trust Settlement of 1871. Kharsetji predeceased Dinbai. Sorabji died on the 31st of August 1902. The third Trustee Merwanji died on the 15th of March 1905. After Dinbai's death the Trusts in respect of the Muktad ceremonies were carried out up till the death of Merwanji in 1905. The first defendant is in possession of the Government Paper of the nominal value of Rs. 15,000 mentioned in the Trust deed of 1871 and the silver utensils mentioned in the will of Dinbai. The Muktad ceremonies were admittedly not performed in the year 1906. The plaintiff filed the suit and obtained an originating summons for the purpose of having certain questions arising under the Trust Deed settled by the Court. The first of these questions is:—

"Whether the Trusts declared in respect of the Government Promissory notes for Rs. 15,000 mentioned in the plaint are valid."

This originating summons first came on for hearing before me in Chambers on the 22nd of June when counsel for the parties appearing at the hearing took it for granted that I would follow the decision of Mr. Justice Jardine in *Limji Nowroji* v. *Bapuji Ruttonji*[1] declaring Trusts for Baj Rojgar and Muktad ceremonies to be invalid. In recent years I had, however, occasions to consider that case, commonly spoken of as *Limbuwalla's* case, and I entertained grave doubts as to the correctness of the application of the rule against perpetuities to trust relating to Muktad and Baj Rojgar ceremonies prevailing amongst the Parsis

(1) (1887) 11 Bom. 441.

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professing the Zoroastrian religion. I had weighty reasons for declining to follow that decision and desiring to judge for myself whether the doubts I entertained were well founded. At this hearing the only question that I was asked to consider was raised by Mr. Kanga for the 1st and 2nd defendants who contended that the plaintiff's claim was barred by limitation. This contention was based on the decision of Mr. Justice Candy in *Cowasji N. Pochkhanawalla* v. *R. D. Setna*[1] and on the assumption that the Trust in question in this suit was bad in law. On my expressing my unwillingness to follow the previous decision referred to above Mr. Bahadurji who appeared for defendants 10 and 11 was instructed immediately to say that he would be prepared to support the Trust. The matter was after some argument adjourned to the following contested Chamber day and came on again for further hearing on the 29th of June when I adjourned the summons into Court for evidence and argument and directed that the Advocate-General be added as a party defendant. At the hearing in Court Mr. Kanga for defendants 1 and 2, Mr. Bahadurji for defendants 10 and 11 and Mr. Padsha for the 12th defendant, the Advocate-General, combined forces and waged uncompromising war in favour of the Trust against the plaintiff whose counsel Mr. Tarachand bore the brunt of the attack with remarkable courage and attempted with much ability to uphold his contention that the Trust created by Dinbai for the performance of Muktad ceremonies was not a Charitable Trust and was bad in law as offending against the Rule forbidding perpetuity.

It is not easy to learn or understand the true meaning and import of the ceremonies involved in the comprehensive word Muktad or Dosla. Though a Parsi myself it took me considerable time before I could correctly understand the real meaning and nature of the ceremonies—their origin and effect—and the true aim and object of the performance of those ceremonies during the Muktad days. As the case progressed before me I realised how much patient labour must have been involved on the part of counsel for all parties before they were able to place the

(1) (1895) 20 Bom. 511.

case before me in the manner in which it was placed before the Court and not a little credit is due to the solicitors who worked and laboured to instruct them so efficiently.

Before I proceed to consider the main point in the case it is necessary that I should deal with the contention of Mr. Tarachund forcibly pressed upon me by him that I was bound to follow the decision of Mr. Justice Jardine more especially as other Judges had followed the same in other cases.

Sitting on the Original Side of this Court I concede at once that I am bound ordinarily to follow the judgment of another Judge when he has decided a question of law—or laid down certain principles of practice or procedure—or judicially construed any provision of the law prevailing in the country. But surely there the matter must end. Is a single Judge bound to follow another Judge's *findings of facts based on the evidence recorded by him*, when the evidence that may be available before the Judge in a later case may be fuller and more reliable and may tend to lead him to a different conclusion? I am fully aware that one of the maxims governing a Judge in administering justice is :—"*Omnis innovatio plus novitate perturbat quam utilitate prodest.*"—"Every innovation occasions more harm by its novelty than benefit by its utility."

This Judicial Rule "Stare Decisis" is discussed at page 69 of the first volume of the 21st Edition of Blackstone's Commentaries where it is said :—

"It is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of *exception*, where the *former determination is most evidently contrary to reason; much more if it be contrary to the divine law.* But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is *manifestly absurd* or *unjust*, it is declared,

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not that such a sentence was *bad law*, but that it was *not law*, that is, that it is not the established custom of the realm, as has been erroneously determined."

The course I thought fit to adopt in this case was not adopted without the most anxious consideration. I have carefully studied every line of the judgment of Mr. Justice Jardine. I have carefully perused the proceedings in the case and studied the learned Judge's notes of the arguments addressed to him by counsel and the evidence recorded by him. The more I have thought over the case the more convinced I have felt that his "*determination is most evidently contrary to reason and is clearly contrary to the divine law*" as it prevails amongst the believers of the Zoroastrian tenets. It is a decision which to my mind is "*manifestly unjust.*"

The error of the judgment of Mr. Justice Jardine is proved to demonstration by the evidence both oral and documentary recorded in this case. As this is the first case that came before the Court, and as the judgment is reported in the authorised reports of our Courts, as other learned Judges have accepted the finding as correct and followed it, I think it is very necessary to examine the circumstances under which the parties to that suit obtained the decision, and see whether the learned Judge was not misled into arriving at an erroneous conclusion by the way in which the case was placed before him.

The plaintiff, as the Committee of the estate of a lunatic, goes before the Chamber Judge and applies for leave to join certain other parties in stating a case for the opinion of the Court under section 527 of the Civil Procedure Code. In support of his application he made an affidavit in which he states as follows :—

"(3) The said Testator set apart the income of the said one-third share in the said Khetwady Bungalow for the performance in perpetuity of certain Private Religious Ceremonies, namely, the Baj Rojgar ceremonies, the consecration of the Nirungdin, the recitation of the Yajusni, and the annual Ghambar and Dosla ceremonies,"

"(6) I am *advised* that the devise of the said one-third share in the said Khetwady Bungalow is void as being in perpetuity and not for a charitable use."

On the plaintiff being authorised to state a case for the opinion of the Court, a case is submitted to the Court wherein it is stated that the plaintiff as such committee as aforesaid and the first four defendants contend that the devise is void as being in perpetuity and not for a charitable use, and that failing the trust the plaintiff and the first four defendants were entitled to the property in equal proportions. The fifth defendant was the mother of the first four defendants and executrix of the will of their father. The sixth defendant was the Advocate-General.

It does not appear from the proceedings who advised the plaintiff and the other parties that the ceremonies in question in the case were private religious ceremonies and that the devise was void in law. At the time the case was submitted to the Court and previously thereto the solicitor acting for the parties could not possibly have done so, as it is proved in this case that he could have known nothing or next to nothing about the nature of the ceremonies. If a case was submitted to counsel the advice would be valueless in that the counsel advising would probably know less than the solicitor preparing the case. The same solicitors who appeared for the plaintiff appeared for the first five defendants. The Advocate-General knowing nothing about the real nature of the Trusts in his capacity as Advocate-General, said nothing, but submitted himself to the orders of the Court but in his capacity as counsel he appeared for the first five defendants instructed by the same solicitors as represented the plaintiff and supported the plaintiff's case. Only one witness was examined in the case.

A lurid light is thrown on how the plaintiff's solicitor within a quarter of an hour educated himself on questions that have cost me many days' concentrated attention to understand and in what manner the only witness was examined before the learned Judge in the course of half an hour or so, by the following passage in the evidence of the same witness Mr. Jivanji "Jamsetji" Mody when examined before me :—

"In the *Limbuwalla* case Mr. Wadia of Messrs. Wadia and Ghandhy came to me and asked me to explain certain ceremonies. The interview lasted for quarter of an hour. Some day subsequently I was asked by a clerk to come to Court. He said the Judge might wish to ask me some question.

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"I demurred to go in that way without notice, but eventually I was persuaded and I came to Court after the tiffin hour. I was very shortly examined. I was given no opportunity to explain my evidence and convey the right impressions to the Judge. Mr. Justice Jardine's decision came to me and many others as a surprise."

The learned Judge's note book affords very instructive reading and shows how the case was engineered at the hearing. Mr. Lang appeared for the plaintiff. The acting Advocate-General, Mr. Macpherson, appeared for the first five defendants. These parties had joined hands to defeat the Charity and divide the spoils. Counsel who appeared in the case could know nothing about the Scriptures and the Ritual of the Zoroastrian religion. They must necessarily depend upon the materials supplied to them in their briefs. Stray passages from Dr. Haug's "Essays on Parsis" and the late Mr. Dossabhai Framji's book were read before the Court. Mr. Jivanji Mody was put in the box and such questions as suited the parties were asked. There was no one present to defend Charity or to explain and elucidate the passages read on the evidence given. Cases which have scarcely any applicability to the trusts in question were cited and a spirit of happy unanimity and perfunctoriness seems to have pervaded the discussion of a question of the most vital importance to a whole community, and the combined efforts of the parties led the Judge into forming conclusions that are manifestly erroneous.

The learned Judge observes in his judgment (at p. 447):—

"From the evidence of the priest and the reference made to Dr. Haug's learned Essays, I come to the opinion that the benefits which, according to the belief of the Parsis, result from the ceremonies specified, are consolation to the spirits of certain dead persons and comfort to certain living persons, afforded by certain of the Frohars or prototypes of the dead."

The learned Judge then goes on to say that the objects of these trusts bear analogy to devise of property to "maintain Tombs of deceased relatives" or for a "gift to private company." The judgment ends up by saying:—

"There has been no conflict, the parties being of accord that the devise is void, and the Advocate-General, as representing the Charity, leaving them in the hands of the Court."

The evidence of the only witness in the case—on a point of such vital importance to a whole community—would not occupy more than one side of foolscap sheet and at the end of the evidence I find a note :—

"As counsel for defendants the Advocate-General supports Mr Lang's case, as Advocate-General he leaves the case to the Court."

From a perusal of the records and proceedings in this case one would be led into the belief that the Zoroastrian religion had no Sacred Books, no Scriptures, no religious literature of antiquity or authority—that Scriptures written in Gatha, Avesta, Pehlvi and Pazund languages which distinguished scholars of the civilized world had laboured to translate and explain for many years never existed, but that the Zoroastrian religion solely depended on a German Doctor's Essays on Parsis and Mr. Dossabhai Framji's interesting book delineating manners and customs prevailing amongst the Parsis and the Bombay Gazetteer. Not a single text from the Scriptures seems to have been cited, not a single book of authority is referred to, not a word appears to have been said as to whether the performance of these religious ceremonies were enjoined by the Scriptures of Zoroastrianism, not a hint is given as to the origin and meaning of the various ceremonies. The only party before the Court—the Advocate-General—whose duty it was to protect the Charity—if of course valid in law—was left in ignorance of the true nature of these ceremonies and he never made an effort to defend the Trust because he must have believed that what was stated in his brief for the defendants for whom he appeared must have been correct, and I have no doubt whatever that those who instructed counsel in the case must in their ignorance have believed that they were putting forth correct instructions.

It never seems to have struck any one in the case that the Trust in question was a religious trust—that it was a trust in "advancement of religion" and as such in law necessarily a charitable trust. It never seems to have struck any one to look at the prayers that are ordinarily recited at the performance of the ceremonies in question to find out whether those prayers

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did not amount to an act of divine worship. The real point in the case was never placed before the Court. The true intent, purport and meaning of the ceremonies required to be performed during the Muktad days were never so much as mentioned, much less explained to the Court. Authoritative translations of the Zoroastrian Scriptures contained in the "Sacred Books of the East" and other works of Oriental scholars were not submitted to the Court for its consideration. Not only evidence which was available in abundance was not given, but the one witness who was examined had no opportunity of explaining or elaborating his answers, but was confined to answers to questions which appear to be framed to suit the purposes the parties had in view. A decision obtained under circumstances such as I have set out can hardly command the confidence of the other parties affected by it. If the community so gravely affected by the decision had a chance of placing all the materials available at the disposal of the Advocate-General —the official guardian of all charities—had he been in a position to put the case fully and fairly before the Court—if anything like what is possible to be said in support of the Trust had been said and considered by the learned Judge trying the issue—if there had been some one before the Court who was interested in supporting the trust and had made even an attempt to do so, I might have hesitated before making up my mind to refuse to follow the decision in the case. I feel very strongly that Mr. Justice Jardine was misled into coming to the conclusions he did and that the judgment in the case was improperly obtained. I do not use the expressions "misled" and "improperly obtained" in any sense offensive to the parties concerned in the case. I have no doubt they acted according to their lights, but it seems to me it would be a very perverse mind that can—after reading the evidence and exhibits recorded in this case—still maintain that Mr. Justice Jardine's conclusions as regards the Muktad, Baj and other like ceremonies are correct. I will conclude the consideration of this case by recording that I feel that if I had merely followed this judgment and declined to Judge for myself I would have been guilty of shirking a duty cast upon me by my office.

I am told that this is not the only case on the subject of trusts in respect of Baj, Muktad and other like ceremonies; that since February, 1887, when Mr. Justice Jardine decided *Limbuwalla's* case discussed above, there have been other cases and that other Judges have come to the same conclusions. The records of the Prothonotary's office have been most carefully searched and every case relating to Muktad and Baj Rojgar ceremonies has been mentioned and discussed before me. In fairness to the plaintiff, who relies on these cases, and in fairness to myself and the course I have adopted, I feel that it is necessary to consider each one of these cases separately—though the review of these cases must necessarily be much shorter than that of *Limbuwalla's* case, which was the first of its kind, and which I am clearly of opinion is responsible for the results of every subsequent case. While writing this judgment I have the pleadings, proceedings, notes of counsel's argument and of evidence, all before me, and although it has taken me considerable time to do so, I have carefully considered and scrutinised every paper important or unimportant in *all* these cases. I will take the cases in their chronological order.

The first case that came before the Court after the decision of Mr. Justice Jardine in *Limbuwalla's* case[1] was *Dinbai* v. *Hormusji Dinsha Hodiwalla*[2]. It is generally spoken of as *Hodiwalla's* case. A Parsi of Surat by his will directed that the income of the residue of his property should be spent in the performance of religious ceremonies affecting the deceased members of his family. He left a mother, who was the plaintiff in the case, and a widow, with whom evidently he was on bad terms and whom he had disinherited by his will—she was the fifth defendant—the first four defendants being the executors of the will. The plaintiff contended that the trust created by the will was void and that she and the fifth defendant, the mother and the widow, were entitled to the residue. Two of the executors did not appear at the hearing—the other two submitted themselves to the Court and the fifth defendant supported the plaintiff's contention. The Advocate-General was no party to the

(1) (1887) 11 Bom. 441. (2) (Unreported) Suit No. 267 of 1890.

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suit but he appeared before Mr. Justice Farran, who heard the case, as counsel for the plaintiff. The Advocate-General cited Mr. Justice Jardine's decision in *Limbuwalla's* case[1], which by then was reported in I. L. R. 11 Bom., referred to the case of *Yeap Cheah Neo* v. *Ong Cheng Neo*[2], which was relied on by Mr. Justice Jardine, mentioned section 105 of the Indian Succession Act, and then examined the testator's brother as the only witness in the case. The witness purports to explain what was meant by "outlays relating to the dead." He mentions Muktad, Baj, etc. His evidence-in-chief consists of seven sentences and his cross-examination of two more short sentences. Mr. Justice Farran gave no judgment but merely recorded a decree declaring that the bequests in the will were void and that the plaintiff and the fifth defendant were entitled to the residue of the estate. It cannot even be pretended that Mr. Justice Farran brought his mind to bear upon the main question in the case. He assumed that *Limbuwalla's* case was rightly decided and merely followed it.

The next case is *Dhunbaiji* v. *Nowroji Bomonji and others* known as *Wadia's* case[3]. Although it was filed before the *Hodiwalla* case discussed immediately before this—it was heard and decided after that case. It involved very complicated questions of devolution of property. It was heard by Mr. Justice Farran also and a decree was passed on the 7th of March 1891. The questions in the suit arose out of an instrument in writing bearing date the 15th of February 1826. It is not necessary for the purposes of this case to go into any other matters in the suit except that portion that relates to the Trust created in favour of Muktad and Baj ceremonies. Para. 8 of the plaint states:—

"By the said writing the expenses of the Baj Rojgar and Muktad ceremonies of the said Nusservanji Dadabhai, Navrozbai, Dadabhai and Jaiji, and the members of the family of the said Nusservanji and Navrozbai *together with those for the maintenance* of the *Fire Temple at Nargore*, were directed to be paid out of the income of the Warehouse at Modikhana and the cart adjoining Churniwadi, and since the date of the said writing such expenses have been paid out of the said income."

(1) (1887) 11 Bom. 441. (2) (1875) L. R. 6 P. C. 381.
(3) (Unreported) Suit No. 565 of 1889.

The first issue in the case was :—

"Whether the bequests and charitable trusts are binding and ought to be carried out."

The sixth issue was :—

"Whether in the events which have happened the plaintiff is not entitled to have the charitable and religious trusts carried into effect."

Mr. Justice Farran begins his judgment by saying :—

"Though the property at stake in the suit is not of great value and the *friendly spirit* in which the cause has been contested shows that its decision is not of great moment."

Referring to the Trusts, he says :—

"Trusts for the performance of Muktad and Rojgar ceremonies have been decided not to be charitable Trusts : *Limji* v. *Bapuji*, I. L. R. 11 Bom. 441. That case has been *frequently followed* and is binding on a single Judge as an authority. The trusts, therefore, not being charitable are void as offending against the law which forbids perpetuities. The fact that the plaintiff and her mother carried out these trusts for a long series of years does not entitle the plaintiff to go on doing so against the wishes of the rest of the descendants of Mithibai."

The findings on the first and sixth issues recorded are in the negative and for the defendants. This case shows that Parsis, as early as 1826, were settling property in perpetuity for the performance of Muktad and Baj Rojgar ceremonies. The passage from the judgment I have set out shows that in this case also the same learned Judge, who heard the previous *Hodiwalla's* case[1] has followed Mr. Justice Jardine's decision in *Limbuwalla's* case[2] without bringing his own mind to bear on the question of these trusts. But the most *startling* part of the case is a portion of the decree which runs as follows :—

"This Court doth declare that the religious and charitable trusts in respect of the Baj Rojgar and Muktad ceremonies *and the maintenance of the Fire Temple* in the town of Nargore in the plaint mentioned are invalid and inoperative and the same are hereby set aside."

The maintenance of the Fire Temple, as I have shown above, is referred to in the plaint. It is not referred to in Mr. Justice Farran's judgment and the discovery of the declaration in the decree that the Trust for the maintenance of the Fire Temple at

(1) (Unreported) Suit No. 267 of 1880. (2) (1887) 11 Bom. 441.

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Nargore is invalid and inoperative will come as a cruel surprise to the counsel for the plaintiff. When in the course of his argument he urged that Trust for Baj and Muktad ceremonies were not trusts in advancement of the Zoroastrian religion, I asked him to give me some instances of trusts that, according to him, would be really in advancement of the Zoroastrian religion, he instanced a trust for the maintenance of a Fire Temple. It seems to me that the attention of the learned Judge, who in this case was considering many complicated questions of devolution of property, was never drawn to this portion of the trusts. The omission of any reference to this branch of the trust where he sums up the provisions of the writing of 1826 in the beginning of his judgment and merely mentions Baj Rojgar and Muktad ceremonies, lends support to my surmise that this particular question could never have been argued before him. I refuse to believe that any Judge of this Court would deliberately declare that a Trust created by a Parsi for the maintenance of a Fire Temple is invalid and inoperative. It appears in the decree because the Judges have nothing to do with the drawing up of decrees unless the parties are at variance and the minutes are spoken to before the Judge passing the decree.

Before leaving the discussion of this case, I should like to say that the statement of Mr. Justice Farran that the decision in *Limbuwalla's* case[1] has been "frequently followed" appears to be erroneous. There was no case between this and *Limbuwalla's* case except *Hodiwalla's* case[2], where the same learned Judge followed Mr. Justice Jardine. Mr. Bahadurji challenged the plaintiff's counsel to produce any other case and a strict search in the Prothonotary's office has failed to find any.

The fourth case relating to Baj Rojgar and Muktad trusts is what is known as *Gorewalla's* case—*Cowasji Byramji Gorewalla* v. *Peerozbai and others*[3]. In this case an attempt was made to uphold the trusts by all the parties other than the first defendant. The trusts were created by a will which was not executed or deposited as required by section 105

(1) (1887) 11 Bom. 441.
(2) (Unreported) Suit No. 267 of 1890.
(3) (Unreported) Suit No. 281 of 1892.

of the Indian Succession Act. An attempt was made to show that the properties were devised to charity before the will, but the attempt failed, the Court holding that there was no such valid devise previous to the will. There was more evidence given in this case than was given before Mr. Justice Jardine, but it was all oral evidence unsupported by any scriptural texts or quotations. Mr. Justice Parsons, who heard the case, delivered an oral judgment, notes of which exist. The following passages occur in these notes:

"Purposes of alleged Trust are six in number—

(1) Asodat (presents to priests),
(2) Supply of sandalwood to temples,
(3) Performance of Baj Rojgar and Muktad ceremonies,
(4) Distribution of alms to deformed,
(5) Outlays on death of relations, and
(6) Good and charitable acts.

Of those only numbers 1, 2 and 4 can be held legal and valid."

"Baj Rojgar and Muktad are only prayers for the death *which have been held to be invalid purposes* by several decisions of the Court and evidence in the case shows the correctness of the decisions. Outlays on deaths of relations are mere private expenses, neither public nor charitable, and other good acts is too vague and indefinite an expression to denote anything."

"The bequest, however, is void as the will was not executed or deposited as required by section 105 of Act X of 1865."

The question as to which, if any, any of the purposes were charitable seems to have been one of academic interest in the case in view of the fact that owing to the will not being executed and deposited in the manner required by section 105 of the Indian Succession Act all bequests for a religious or charitable use would be void.

The *several decisions* referred to by the learned Judge are only the decisions in the three cases I have discussed previous to this.

Plaintiff's counsel argued that in this case at all events the Court considered the evidence and he points to the words "the evidence in this case shows the correctness of the decision." I have read that evidence; it is very meagre and very incomplete. It is not supported by a single quotation from a reference to the

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scriptures. It seems to me, however, that in this case it was really not necessary to find on the evidence at all, and the finding really never affected the result, as the bequests were void for non-compliance with the requirements of section 105 of the Indian Succession Act. The predominating factors influencing the finding, however, were the "several decisions of the Court" which the learned Judge had in mind.

However be it, it cannot be argued that I am bound to follow this finding—if finding it be—on the evidence recorded in that case, when fuller and far more satisfactory evidence was available in the case before me.

The fifth case in which the question of Baj Rojgar and Muktad ceremonies came up before the Court for consideration was *Maneckji Edulji Allbless and others* v. *Sir Dinsha Manockji Petit and others*[1]. It is known as the *Allbless* case, and was heard by Mr. Justice Bayley. In the course of the hearing the learned Judge has recorded the following note:

"The Advocate-General says he understands Parsi community are not satisfied with that decision... (referring to 11 Bom. 441) and that he will not object to its being reconsidered."

Evidence has been recorded in this case and much of what I have said as to the evidence in the previous case also applies to the evidence in this case.

In this case the settler had set aside Government Paper of the nominal value of twenty-five thousand, and directed that the income thereof should be used for the purpose of perfoming Baj Rojgar and Muktad ceremonies and also for the purpose of giving "Dinners of Feasts to the indigent poor Parsees and Eranees or Persian Parsees respectively who may be disabled by age, blindness or other infirmity of body or mind and who may for the time being be residing in the charitable buildings or asylums provided for them at or near Malabar Hill near the Towers of Silence". The learned Judge delivered an oral judgment on the 16th of April 1895, and passed a decree declaring "that the Trusts declared in the said Indenture of the 30th day of June 1880 as to Promissory Notes of the Government of India of the

(1) (Unreported) Suit No. 96 of 1892.

nominal value of Rs. 25,000 *are wholly void.*" Thus the remarkable result achieved by reconsidering the decision of Mr. Justice Jardine is not only that the Trusts for Baj Rojgar and Muktad ceremonies are void but that a Trust created by a Parsee for feeding the indigent, blind and infirm members of his community, who, by reason of their misfortunes and afflictions, would be inmates of the charitable houses provided for them by their community are also void. This decision requires much understanding, and it is very unfortunate that no authentic note of the judgment exists amongst the records of the Court. The plaintiff's counsel has furnished me with notes of the judgment taken by counsel, and what they show makes it still harder for me to reconcile what the learned Judge is taken down as having found on the evidence with what he decided. One thing is quite clear. The main ground of his decision was the judgment of Mr. Justice Jardine. The following are some of the notes taken by counsel:

"Sanjana's evidence showed that ceremony *is for benefit of whole community* but especially and primarily for relations of deceased persons."

"*The public benefit is extremely small.*"

"The ceremonies are primarily and principally for the dead and *incidentally for the whole community.*"

"As to feeding of poor attempt has been made to separate the benefit but in my opinion the feeding provision stands or falls with the whole bequest of 25,000 rupees. Witness said: Feeding is part of the ceremony following at end of the ceremony."

"As to Baj Rojgar ceremony—trust is void by virtue of Indian Law Reports 11 Bom. 441."

"Decision of Farran, J., in 565 of 1889 following above case though unreported as stated by counsel."

"*I follow* 11 *Bombay* and hold that the ceremony is a private one, and the feeding a part of the same occasion as the Baj Rojgar ceremonies and the trust for Rs. 25,000 fails and forms part of the settler's estate."

Here we have the first faint indication that the ceremonies were for the *benefit of the whole community*, though the learned Judge thought the benefit was only incidental and that *there was public benefit*, although in the opinion of the Court the benefit was extremely small.

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The next case is spoken of as *Markur's* case—*R. R. Dadina* v. *Advocate-General and others*[1]. It arose out of two Trust deeds executed by the late Mr. Framji Markur, and amongst the very many questions that arose, the questions of the validity of Trusts in respect of Baj and Muktads was one. I have perused with care the evidence in the case and Mr. Justice Candy's long judgment on the various points arising therein. With reference to the question I am now considering this is what he says:

"In *L. N. Banaji* v. *Bapuji Ruttonji*, 11 Bom. 441, Mr. Justice Jardine held that trusts for the purposes of performing the following ceremonies were not valid charitable trusts. The ceremonies were:

Baj Rojgar, Consecration of Nirungdin, Recitation of the Yejushni, Annual Ghambars and Dosla ceremonies.

The only witness called in the suit on this part of the case was Mr. Hormusji Chichgur, a solicitor of this Court."

Now Mr. Hormusji Chichgur was a layman and never pretended to be a Pehlvi, Zend or Avesta scholar, and his evidence is of the most formal description, mostly directed to explain what the Navjote (Investiture of Sacred Thread) ceremony was. He, however, had the courage to tell the Court that the decision in *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*[2] "caused a great shock." Mr. Justice Candy had no better materials placed before him than was before Mr. Justice Jardine and he merely followed that learned Judge's decision.

The seventh and last case, Suit No. 468 of 1895—*Cowasji N. Pochkhanawalla* v. *Rustomji Dossabhoy Setna*—was also heard by Mr. Justice Candy. It is reported.[3] The only question argued in the case was one of limitation and on that question the learned Judge, in passing, remarks: "In February 1887 there has been a decision of the Court, *L. N. Banaji* v. *Bapuji*[2], that the objects of such a Trust were not valid charities."

These seven cases that I have discused above are all the cases that came before the High Court between 1887 and now. The

(1) (Unreported) Suit No. 49 of 1895. (2) (1887) 11 Bom. 441.
(3) (1895) 20 Bom. 511.

question does not seem to have arisen previous to 1887. These are cases the decisions in which I am asked to follow. When carefully examined, it is clear that in all the cases that succeeded *Limbuwalla's* case[1] the learned Judges have followed Mr. Justice Jardine's decision. When read in the Law Report, where it is published, that judgment at first sight impresses the reader. It tells one how a head priest had expounded and explained the ceremonies, and the result that follows is of course correct if the learned Judge's finding of fact as to the real nature and true meaning of the ceremonies is correct. I have no hesitation whatever in saying that the evidence, both oral and documentary, recorded in the present case *demonstrates* beyond any doubt that the learned Judge was led by the parties to that suit possibly unintentionally but undoubtedly *led* into an error in believing that trusts for Baj and Muktad ceremonies were not charitable trusts and as such exempt in law from the application of the rule against perpetuities. In one or two subsequent cases an attempt was made to supply the deficiency in the evidence so palpably apparent in the first case—but the attempt was so feeble—the additional evidence so slender—the further materials supposed to be placed before the Court were so meagre, that it is no wonder that the learned Judges thought it safer to follow than to disturb what they took to be settled law. Studying the evidence with care in the *Gorewalla*[2] and *Allbless*[3] cases, it becomes quite evident that the whole fault lay at the door of those instructing counsel, for judging from the questions put and the answers elicited from the witnesses, it seems that although witnesses evinced anxiety to lead counsel on the right track, counsel took the witness away into matters which did not affect the real question before the Court. It seems to me amazing that no one in all the cases took the trouble to go to the original sources—the scriptures of the religion, to which the ceremonies belonged—to the sacred writings that are most undoubtedly authoritative, and—to the original texts founding the ceremonies and enjoining the performance thereof. The most important portions of the scriptures of the Zoroastrian religion of the ancient Persians are all translated

(1) (1887) 11 Bom. 441. (2) (Unreported) Suit No. 281 of 1892.
(3) (Unreported) Suit No. 96 of 1892.

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into English by eminent Oriental Scholars and are all contained in the volumes of the "Sacred Books of the East" edited by Professor Max Muller. These Books are easy of access and a complete set is in our Law Library, and yet it is a most inexplicable circumstance that these books have never been touched and nothing in them ever placed before the learned Judges who heard seven successive cases. These cases contain indication that the Parsi "community was not satisfied with the decision" in the case of *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*[1] that "it caused a great shock," and yet it is a most remarkable circumstance again that it never struck those affected by the decision to approach the Advocate-General—put the case properly before him—put him in funds to fight the case on its true merits, and if necessary take it to the Appeal Court. No Advocate-General, if properly approached, would have refused to lend the whole weight and authority of his position in making a fight in favour of the charity.

The decisions of all the previous cases have been based on the evidence placed before the Court in each instance. On the evidence the learned Judges came to the conclusion that the Trusts were not charitable in the legal sense of the term and that they transgressed against the rule which forbids perpetuities. These decisions are based on findings of facts, on the evidence given in each particular case. It would be sufficient for me to say that it is quite open to me to judge for myself and find on the evidence tendered before me. If, however, it is necessary for me to say, I am prepared to say that in my opinion the "former determination" of Mr. Justice Jardine and the other decisions based on that determination appear to me, in the words of Blackstone, in the passage cited above, to be "evidently contrary to reason and clearly contrary to the Divine Law," according to the beliefs of the community professing the Zoroastrian religion, and that they are "manifestly unjust," and I refuse to follow them.

The only question before me in this case is: Is the Trust created by Dinbai for the performance of Muktad ceremonies a

(1) (1887) 11 Bom. 441.

Charitable Trust in the legal sense of the word charitable, and, as such, exempt from the application of the rule against perpetuities? For the proper determination of the question it is absolutely necessary that in the first instance the true nature and meaning of these ceremonies should be clearly understood, and I will first consider what are Muktad or Dosla ceremonies, before discussing the law applicable to Trusts for the performance of these ceremonies. Three members of the community, of established reputation for great learning and original research in the Scriptures of the Zoroastrian religion, have been examined before me, and numerous passages from the original writings dating from the most ancient times have been cited, explained and put in at the hearing of the suit. Wherever the correctness of any statement of these witnesses was challenged or doubted, they were able to refer to the original texts in support of their statements. From the evidence given before me at the hearing, it appears that the Zoroastrian religion is a revealed religion. It was revealed to Zoroaster or, as he is sometimes called, Zarthustra by Ahura Mazda the Supreme Being, who, according to scripture, was the only self-created Being. The celestial Hierarchy consists of six Amasha Sapentas or Amshaspunds. Ahura Mazda himself is sometimes spoken of as the Chief Amesha Sapenta, in which case they would be seven. The Amesha Sapentas are referred to in the Scriptures as the Bountiful Immortals. Then come thirty-three Izuds. Before bringing into existence the material creation, Ahura Mazda brought into being Furohurs or Fravashis, and these Fravashis helped the Almigthy in bringing into existence all material creation. According to the Avesta Scriptures, the first man created was Gayomard, also known as Kayomard. Either he or his great-grandson Hooshung was the founder of the Peshdadian dynasty. Historians have not been able to say during what period of time this dynasty reigned over Persia.

This dynasty was followed by the Kaianian Dynasty which was founded by Kai Kobad. One of the Kings of this dynasty was Kai Gustasp, otherwise called Kai Vistasp. In the Scriptures of Zoroastrian religion he is mentioned and referred to. Zoroaster flourished in the reign of this King. The religion revealed by Ahura Mazda to Zoroaster was by Zoroaster

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communicated to King Vistasp and was then promulgated amongst the people. Oriental scholars and historians have not been able to fix with any certainty the period of the reign of King Kai Vistassp. Many are inclined to fix the period at five or six thousand years before Christ. Dr. Haug believes Zoroaster flourished about 1100 B. C. Whereas Professor Darmesteter believes that he flourished somewhere about 600 B. C. This, however, is the latest date fixed by any historian or Oriental scholar and all that can be said with some amount of certainty is that Zoroaster lived and flourished considerably before 600 B. C. Some of the scriptural writings and prayers, however, are shown to be much older than 600 B. C. For instance, the Farvardin Yast is said to have been written about 1500 B. C. and the sounder opinion seems to be that Zoroaster flourished long before 600 B. C. The Kaianian Dynasty was followed by the Achamenian Dynasty. During the reign of the last King of this dynasty, Alexander the Great conquered Persia. It is believed that a great portion of the Avestaic literature was burnt or lost during this invasion and conquest of Persia. Tradition has it that Alexander himself set fire to a library containing Zoroastrian scriptures, but many Oriental scholars believe that this is an unjust slur cast on the conqueror of Persia. However that may be, the fact remains that about this period a great portion of the scriptural literature of the ancient Persians was lost or burnt. The period which followed the conquest of Persia by Alexander was, so far as the Zoroastrians were concerned, a period of darkness—during which the religion suffered considerably. After the dark ages, came the Parthian Dynasty. During the reign of one of the kings of this dynasty the religion of Zoroaster began to revive, and in the reign of the first King Ardashir Babegan of the Sassanian Dynasty which followed the Parthian Dynasty, Zoroastrianism became the religion of the King and of the Empire of Persia. In the reign of Ardashir Babegan, Zoroastrianism became the religion of the State—its scattered scriptures were collected—the Avestan writings were translated into the Pehlvi language, and commentaries were written. The original scriptures that were lost were about this time rewritten and reproduced by men whose forefathers had committed them

to memory and in that way transmitted them from father to son. One of the Sassanian Kings that followed Ardashir Babegan was Shapur the Second. The greatest Dastur known to the Zoroastrians of all ages—Dasturan Dastur Adarbad Maharesh-pund—flourished in his reign. Shapur the Second reigned over Persia from 309 to about 380 A. D. and during this period the Great Dastur composed and wrote the Patet Pashemani, Duva Nam Satayoshni, Tun Darosti and other prayers, and almost all the Afrins. This great apostle of the Zoroastrian religion is regarded with the highest reverence by all true believers of the Zoroastrian faith and the prayers composed by him are at this day recited and regarded with the very greatest of veneration by the Parsis professing the Zoroastrian faith.

Zoroastrianism flourished in Persia with varying fortune till the persecution of Mahomedans drove the majority of those that professed that religion out of their ancient home. A body of Persians professing the Zoroastrian religion were compelled by reason of religious intolerance and persecution to leave Persia about 1200 years ago. They first took refuge in Kohistan, where they remained for about 100 years—they then went to the Isle of Ormuz, where they remained for about 19 years. They then came to Diu, near Kattyawar, and remained there for about 15 years. From Diu they came to Sanjan, and there they settled down for very nearly 700 years. From Sanjan they spread over various places in the Gujarat district and their principal head-quarters now are Bombay, Naosari and Surat. A sprinking of Parsis are to be found in several villages in Gujarat. They derive their present name Parsi from Fars, in Persia, from which place they originally came to India.

It was their staunch adherence to their own religion and their refusal to adopt the religion of their Mahomedan conquerors that was the cause of all the sufferings they had to undergo. They preferred to leave their country and exile themselves to a foreign land rather than give up the religion of their forefathers. They have persevered in their religious beliefs, preserved their old institutions and customs and have in the country of their adoption continued to follow the ancient religion of their

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ancestors. One of the most solemn ceremonials enjoined by the religion promulgated by Zoroaster is the performance of certain religious ceremonies during the Muktad days. The Muktad days are otherwise known as Dosla or Farvardgan days. These Farvardgan days are days that are sacred to the Furohurs.

Before proceeding with the consideration of the ceremonies themselves, it is very necessary to have clear conception of what the Furohurs are, according to the Zoroastrian scriptures. The Furohurs are constantly referred to in the Sacred Books of the Zoroastrians, and are the same as Fravashis. "Furohur" is the modern Persian name. Fravashi is the corresponding Avestaic name. In *Limbuwalla's* case[1] Mr. Justice Jardine says:—

"According to Dr. Haug these *Furohurs* were originally the departed souls of ancestors, comparable to the *pitras* of the Brahmins and the *manes* of the Romans. Now they are regarded as Guardian Angels, each being of the good creation having one."

That this is an error is shown in the case both by the oral evidence of the witnesses examined before me as well as by copious quotations from the original scriptures. The same error that Dr. Haug commits is also committed by Professor Darmesteter, who in his Introduction to the Farvardin Yast, says:—

"The Fravashi is the inner power of every being that maintains it and makes it grow and subsist. Originally the Fravashis were the same as the Pitris of the Hindus or the Manes of the Latins, that is to say, the everlasting and deified souls of the dead."

All the three witnesses in this case are profound scholars of the Zoroastrian scriptures, whose opinions are entitled to far greater weight, agree in saying that what is stated above by Professor Darmesteter and Dr. Haug is erroneous, and they have quoted passages from the original scriptures in support of their views. Dastur Darab in his evidence says:—

"In his introduction to the Farvardin Yast, Professor Darmesteter says that the Fravashis were originally the same as the Pitris of the Hindoos or Manes of the Latins. This, according to my opinion, is incorrect; it is merely the conjecture of Professor Darmesteter. According to the Avesta the idea of Fravashis is that they are Spiritual Existences which were brought into being by the Almighty *before* he created the Universe. They came into

(1) (1887) 11 Bom. 441 at p. 446.

being *before* all material creation, every man born or unborn has a Fravashi of his own, according to the Avesta. After the birth of the man or woman his or her Fravashi watches over his actions and guides him to the right path. The Fravashi protects him or her from all evil. After death the Fravashi goes to heaven, and the soul, according to his deeds, goes to heaven or hell as it deserves. According to Zoroastrianism the Fravashi is not responsible for the man's good or bad actions. The soul is responsible for all acts committed in life. Inanimate objects have their Fravashis too. The Fravashi aids both animate and inanimate objects—animate objects in their moral and physical development, inanimate objects in their growth and development."

"Furohurs are *not* souls of the dead. They are totally different Entities. Souls of the dead are known as Ravan. Ravan is the Persian word for the soul of the dead. The Avestaic word for the soul of the dead is Uravan."

Ervad Jivanji Mody confirms this. He says:—

"The Fravashis are *quite distinct* from the souls of the dead or from the souls of the living. Fravashis and souls are not identical in *any* respect * * * the souls and Furohur are two distinct Entities. That appears from various parts of the Zoroastrian scriptures."

The witness then points out several passages, which are put in and marked Exhibits Nos. 22, 23 and 24 in support of his statement, and then goes on to say,

"There are similar passages in various religious books making similar distinctions between the soul (Ravan) and Furohur. A human being is said to possess *both* soul *and* Furohur. The function of the Furohur during a human being's life is to guide the soul in paths of virtue. After a man's death the soul meets with the consequences of its actions in the world. The Furohur mixes with the other Furohurs of the world or goes to its abode in Heaven."

Ervad Sheriarji Bharucha, who followed Mr. Jivanji Mody, confirmed the views of the previous witnesses. That the view of the total distinction between the soul and the Fravashi of a human being is absolutely correct appears from the following original scriptural passages placed before the Court.

"And (having invoked them) hither, we worship the spirit and conscience, the intelligence *and Soul and Fravashi of those holy men and women* who early heard the lore and Commands of God."

(Yasna Ch. 26, para. 4, "Sacred Books of the East," Vol. 31, page 278, Exhibit No. 18.)

"We present hereby and we make known, as our offering to the bountiful Gathas which rule (as the leading chants) within (the appointed times and seasons of the Ritual, all our landed riches, and our persons, together with our

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very bones and tissues, our forms and forces, our consciousness, our *Soul and Fravashi.*"

(Yasna Ch. lv, para. 1, "Sacred Books of the East," Vol. 31, page 294, Exhibit No. 22.)

"Yea, I desire to approach the Fravashis of the Saints with my praise, redoubted (as they are) and overwhelming, the Fravashis of those who held to the ancient lore, and Fravashis of the next-of-kin; and I desire to approach towards *the Fravashi of mine own Soul* in my worship with my praise."

(Yasna Ch. xxiii, para. 4, "Sacred Books of the East," Vol. 31, page 273, Exhibit No. 23.)

"All pure Heavenly Yazatas we praise—all earthly Yazatas we praise—*we praise our own Souls—We praise our own Fravashi.* Come hither to help me, O Mazda. The good, strong, holy Fravashis of the pure we praise."

(Khorsed Nyaz—Spiegel's "Avesta" volume iii, p. 7, Exhibit No. 24.)

These are not by any means the only or solitary passages in the holy writings showing that the soul is entirely different and distinct from the Furohur. Ahura Mazda Himself, the Creator of the Universe, has a Fravashi of his own. In Chapter 26 of the Yasna, paragraph 2, we find this passage :—

"And of all these prior Fravashis, we worship here the Fravashi of Ahura Mazda, which is the greatest and the best, the most beautiful and the firmest, the most wise and the best in form, and the one that attains the most its ends because of Righteousness." ("Sacred Books of the East," Vol. 31, page 278.)

Paragraphs 85 and 86, Chapter 24 of the Farvardin Yast (Exhibit No. 2) ("Sacred Books of the East," Vol. 23, page 200) shows that not only are there Fravashis of human beings, but there are Fravashis of the Holy Creation and of inanimate objects, such as fire, water, sky, plants, the earth, etc.

By far the best description of what is the true conception of the Zoroastrian religion regarding Furohurs that I have come across is contained in Naib Dastur Rustomji Peshotan Sanjana's very learned book "Zarathustra and Zarathustrianism in the Avesta," at page 242. He says there :—

"Before proceeding further it would be useful to say a few words about the signification of the term Fravashi, that so often occurs in our Sacred writings. The word is derived from Fra—forward, and vared, or vakhsh—to grow, to increase, to advance or to cause prosperity. Fravashi is then, that animating power in a being which causes growth, increase,

advancement or prosperity. The Avesta tells us that all beings including Ahura Mazda Himself, have got their own Fravashis. The earth, the fire, the sky, the water, the plant, the animal, the Blessed Shrosh, the truest Rashna, Mithra, Mathra-Sapanta, and all other things, either material or immaterial, have been endowed with that power which tends to preserve and promote their well-being. Man also possesses it. . . . The Fravashis of living holy men are more powerful than those of the departed. From the former the world derives benefit directly, whereas from the latter only indirectly through their good example and influence. . . It is through the Holy Fravashis that the earth, the water, the plant, the animal, and all other things, both animate and inanimate, are preserved and promoted in this world."

With reference to this quotation, I think it is necessary to mention that for every statement made therein the learned author has cited authority in his footnotes. Professor Darmesteter seems to suggest that the conception of Furohurs as given in the above passages is a conception of a later date, for in his introduction to the Farvardin Yast, after saying that the Furohurs are the same as the Pitris of the Hindus and Manes of the Latins, he goes on to say :—

"In course of time they found a wider domain and not only men but goods and even physical objects, like the sky and the earth etc., had each a Fravashi."

There is only one remark to be made in connection with the opinion of Professor Darmesteter about this conception of Fravashis having come into existence in later times and that is that it is entirely contradicted by the original scriptures from which I have quoted passages above. The witnesses in this case who aver emphatically that this opinion is erroneous and that the souls of the dead and the Furohurs are totally different and distinct and have nothing in common, are supported by original scriptural texts. Para. 76 of the Farvardin Yast ("Sacred Books of the East," Vol. 23, p. 198) proves that the Fravashis were brought into being and were already in existence before the Almighty created this world. The para. runs :—

"They are the most effective amongst the creatures of the two Spirits, they the good, strong, beneficent Fravashis of the faithful, *who stood holding fast when the two Spirits created the world*, the good Spirit and the evil one."

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It is true that in that portion of the original Gathas that remains to us there is no reference to the Fravashis, but Ervad Sheriarji points out that the earliest reference to the Fravashis is in the Haptang Yast, which is a portion of the Yasna. It is written in the Gatha dialect, and therefore, he contends, it must have been written very near the time that the Gathas were written. The plaintiff's counsel was throughout the hearing most ably assisted in the conduct of his case by men who have made a study of the scriptures relating to the Zoroastrian religion, but he was not able to cite one single text or passage which could even remotely support the theory that Furohurs and souls of the dead were one and the same thing. This theory is the foundation on which the judgment of Mr. Justice Jardine is based in *Limbuwalla's* case[1]. After a perusal of the evidence recorded in this case—principally the evidence from the Scriptures themselves—I do not think there is any possible room to doubt the conclusion that the theory that Furohurs and souls are the same or have anything in common is wholly and absolutely fallacious. That this is the conviction forced upon the mind of the counsel for the plaintiff himself after a study of the subject, seems to be fairly clear from the following questions he put to Dastur Darab.

Question—"Those who have read the Scriptures know the difference between Fravashis and Souls, but is it not a general belief amongst those who have *not* read the Scriptures that Muktad ceremonies bring benefit to the Souls of their deceased relatives?"

Answer—"They believe that the Souls are pleased. They believe that *one* of the benefits is that the Souls get pleasure and satisfaction."

Question—"Was the distinction between Fravashis and Souls, *which is so well known now*, generally known amongst the Parsis 30 years ago?"

Answer—"It was known, but I cannot say what was generally known 30 years ago."

Once it is established that the Fravashis were created before the world and came into existence before any human being was created, it is impossible to believe that they are the same as the souls of the dead. Besides, how is it possible to conceive that the Fravashis of Immortal Amasha-Sapentas, or Archangels, and

[1] (1887) 11 Bom. 441.

Izuds, or Angels, and the Fravashis of inanimate objects, like the sky, earth and water, be the same as the souls of the dead. The clear and lucid exposition of the real nature and meaning of what the Furohurs are according to the religion of Zoroaster that has been given by the witnesses in this case, supported by original texts, destroys the very foundation on which the whole fabric of *Limbuwalla's* case[1] is constructed.

Having seen what the Furohurs are according to the scriptures of the Zoroastrians, I think it is necessary here to examine shortly what those scriptures are that have remained to us at the present day and are available to us for authoritative reference. It appears from the study of the literature now available to us that in the most ancient times when Zoroastrian religion came into existence, there were 21 Nasks (books) of the Avesta scriptures. All except about a fifth part of these holy writings are lost. What remains to us of the original 21 Avesta Nasks are the Vendidad, the Yasna, the Visparad, and the Khordeh Avesta. Of these the oldest are written in the Avesta language, the next in antiquity are written in the Pehlvi language, and then come those that are written in the Pazund language.

The *Vendidad* is a Code of 72 Religious, Social and Moral Laws of the ancient Iranians, and it also contains an enumeration of sins and their punishment both here and hereafter.

The *Yasna* or Yejusni consists of 72 chapters. The five Gathas form part of the Yasna chapters. The Gathas are hymns expressing philosophical thoughts on the teachings of the Prophet Zoroaster and on the good Spirits the Amasha-Sapentas and the Izuds that work with the Deity. The Yasna contains invocations to the various Izuds and describes their several functions. It also contains liturgical directions and prescribes the Ritual to be observed at the performance of certain ceremonies.

The *Visparad*, consisting of 23 chapters, mostly contains invocations to the Amasha-Sapentas and the Izuds.

The *Khordeh Avesta* contains Afringans, Ghes, Nyaz, Yasts, Patets, Afrins and certain other prayers.

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Besides the Nasks that remain to us we have various other books of antiquity and authority which are accepted by the Zoroastrians as forming a part of their religious scriptures.

One of such books is the *Dinkard*. It is the compilation of Dastur Atro Froba, and is ascertained to be written a thousand years before now. Dastur Darab has already translated a portion of this work and he is engaged now in translating other portions of it. Dr. West's translation of the Dinkard is in the 37th volume of the "Sacred Books of the East" and is prefaced by an exhaustive Introduction giving the nature and character of the composition. Dr. West says: "It is evident that the compiler intended, in the first place, to give merely a very short account of the general contents of each Nask, to be followed by a detailed statement of the particular contents of each chapter, etc."

Another work of authority is *Shayast La Shayast*, meaning the Proper and Improper. Its translation in English is in the fifth volume of the "Sacred Books of the East." The Introduction describes it as "a compilation of miscellaneous laws and customs regarding sin and impurity with other memoranda about ceremonies and religious subjects in general." Dastur Darab points out a reference in the book to the Hasparam Nask, which existed originally in the Avesta language, as showing that the author had drawn his materials from the original Nasks before they were lost, because the Hasparam Nask is one of the original Nasks that are now lost to us. Shayast La Shayast was written about the end of the Sassanian dynasty—in the middle of the 7th century Anno Domini.

Another ancient compilation which is regarded as a book of authority relating to the Zoroastrian religion is the *Sad Dar*, which literally means a hundred subjects. Its age and authorship is lost in antiquity. Its English translation appears in the 24th volume of the "Sacred Books of the East" and the introduction states that it is generally accepted as a work of "important authority" and contains a "convenient summary of many of the religious customs handed down by Pehlvi writers."

The Nirungistan is another book relating to Zoroastrian scriptures. It is a Pehlvi composition and its author is unknown.

It came into existence some time between 226 B. C. and 600 A. D. "The whole book," says Ervad Sheriarji, "is a ceremonial code, or rather a manual or guide book for priests. The book deals with the duties, functions and rules relating to the Ervads or ordained Priests." This book is published by the Parsi Punchayat, and Dastur Darab has written an introduction and given the various meanings of the words in the original texts.

These, according to the evidence given before me, are the principal authoritative scriptural writings, governing the Zoroastrian religion.

I will now consider what are the Muktad, Dosla or Farvardigan days. All these three expressions refer to the same thing. The three fundamental beliefs of Zoroastrianism, or the three Essentials of Zoroastrian religion as Ervad Jivanji Mody calls them, are :—

(1) Belief in the existence of One God—Ahura Mazda;

(2) Belief in the Immortality of the soul; and

(3) Belief in the responsibility hereafter for good and bad acts done on earth.

The Zoroastrian religion as revealed to Zoroaster by Ahura Mazda and communicated by Zoroaster to King Vistasp and his other disciples, contemplates no sects or sections; the community of believers in Zoroastrianism are all Mazdyasnians. Through a mistake in the calendar, however, there is a difference of opinion amongst the Parsis of the present day as to the date when their year ends and the new year commences. The larger section, the Shenshais, believe that their new year commences in the middle of September, while the smaller sect, Kadmis, believe that the new year commences a month earlier. There is no other difference between the sects so far as religious beliefs are concerned. The Zoroastrian year consists of twelve months each of thirty days. But at the end of each year occurs five Intercalary days which are known as Gatha Ghambars. These are the holiest days of the year. The winter ended the old Iranian year. The Muktad ceremonies are enjoined to be performed at the end of the year. The majority of Parsis in India regard eighteen days as Muktad or Farvardigan days. Dastur

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Darab thinks the first and the last two days are not really Farvardigan days, but that real Farvardigan days are fifteen—namely, the last five days of the last month of the year—the five Gatha Ghambar days, and the first five days of the new year. Ervad Jivanji also says that according to the common practice prevailing amongst Parsis both in Bombay and the Mofussil, Farvardigan days are eighteen. A very small minority of the Parsis of the present day are, however, of opinion that the real Farvardigan days are only ten, and they say the first five days of the new year are not really Farvardigan days. How this difference arose is fully explained in Ervad Jivanji's book, an extract from which is Exhibit No. 25. However that may be, there is no question that the Farvardigan days whether they be eighteen, fifteen, or ten according to each individual's honest beliefs, are days which are regarded by Zoroastrians as days of the greatest sanctity. There are very few outward ritualistic practices amongst the Parsis. The principal form of profession of faith—the discharge of the religious duties and obligations—the main observance of religious rites,—consists in reciting prayers and having prayers recited by their Mobeds or Priests.

All witnesses agree in saying that the Farvardigan days form the most important festival in the Zoroastrian calendar, and that the ceremonies performed during the Farvardigan days form the most important ritual of the Zoroastrian religion. They agree in saying that the performance of the Muktad ceremonies during the Farvardigan days is enjoined by the Zoroastrian religion—that those ceremonies are acts of great religious merit—they form the most important portion of their divine worship, and that according to the beliefs of those that profess the religion the performance of the Muktad ceremonies not only brings down the blessings of the Almighty on the party performing them and his household but on the whole community, be they Zoroastrians or non-Zoroastrians—their King and his Satraps, and on the whole universe. They are ceremonies that involve praise, adoration, propitiation, recognition and worship of the Supreme Being from all his creatures here below. The non-performance of the Muktad ceremonies is, according to the scriptures, a sin which is taken into account

when, after death, a man's good and bad actions are weighed and reward or punishment is meted out to the soul.

It must be remembered that what I have summarised above are statements made by three of the most eminent living oriental scholars and profound students of Avestaic—Pelhvi and Pazund—literature relating to Zoroastrian religion. In what they have said they are in entire accord with one another and for every statement made by them they have quoted chapter and verse from the original scriptures.

It is said that Mr. Justice Jardine's finding in *Limbuwalla's* case[1] "that the benefits which, according to the belief of the Parsis," resulting "from the ceremonies specified, are consolation to the spirits of certain dead persons and comfort to certain living persons, afforded by certain of the Furohurs or prototypes of the dead," is in accordance with the belief prevailing amongst the Parsis of the present day. The plaintiff's counsel points to the phraseology of the settlement in the present case: "Annual Muktad ceremonies of the dead members of the family in both sects Shinshais and Cudmis." It is possible that from the fact that the dead of a party performing the ceremony being incidentally remembered during the recitation of some of the prayers, the ignorant and the illiterate members of the community may have formed an erroneous belief that the Muktad ceremonies are performed merely for the benefit of the souls of the dead. It has not, however, been seriously argued before me that the Court is bound to be guided by erroneous impressions produced on the minds of ignorant members of the Parsi community. One has only to read the very clear and convincing evidence given in the case and to refer to the scriptural passages placed before the Court to come to an unhesitating conclusion that the Muktad ceremonies performed during the Farvardigan days have *nothing whatever* to do with the souls of the dead and have not the least tendency of conferring any benefits on the souls of the dead members of a family. The ceremonies enjoined to be performed during the Farvardigan days are not in any way connected with the souls of the dead and the suggestion that they are

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is contradicted by the scriptures and the tenets of the Zoroastrian religion. All the ceremonies for the souls of the dead are performable on certain days calculated from the date of the death. We have first, ceremonies performed for the benefit of the souls of the dead for the first three days, and on the fourth or Charum day. Then follow the Dasma, or the tenth-day ceremony, next the Massisa, or the thirtieth-day ceremony—next the Chhumsi, or the sixth-monthly day ceremony, and then the Varsi or the anniversary of the day of death. In some families the anniversary ceremony is performed for several subsequent years. All ceremonies after the first three days are more or less commemoration ceremonies; for if the scriptures are true, nothing that one can do affects the soul or redounds to its benefit after the fourth day. According to the beliefs of the Zoroastrians founded upon their ancient scriptures, the soul of the dead remains in the place where death takes place for the first three days. On the dawn of the fourth day the soul ascends and reaches the Chinwad Bridge. There the Angels weigh its good deeds and its evil acts during its sojourn on earth, and if the good deeds outweigh the bad ones by certain Cetrs, the soul is allowed to cross the bridge and enter the abode of Heaven. If, however, its sins outweigh its good deeds by certain Cetrs it is thrown from the bridge into hell below. On the fourth day reward or punishment is meted out to the soul and the *Judgment is irrevocable.* There is nothing in the scriptures for the redemption of the soul after the final judgment of the fourth day. How then can it be said that any ceremony or prayers performed or recited after the fourth day can tend towards or can be intended for the benefit of the soul? That the Muktads have no connection with the souls of the dead, is, I think, also clear from the fact that the time of their performance has no reference to the date of the death of individuals.

If the belief exists in the minds of some that Muktads are intended for the benefit of the souls of the dead, it clearly is an erroneous belief for which there is no foundation whatever, and can only exist amongst the ignorant and the illiterate. In the Zoroastrian religion no days during the year are as holy as the Farvardigan days and no ceremonies so sacred as the Muktad

ceremonies. The observance of the Farvardigan days and the performance of the Muktad ceremonies is enjoined by the Zoroastrian scriptures. Paragraphs 49 to 52 of the Farvardin Yast show that the Zoroastrians are asked to perform certain ceremonies during the Farvardigan days.

The Farvardin Yast is written in the Avestaic language, and its earliest age is said by some scholars to be 1500 B. C.; whilst others give 600 B. C. as the date when it came into existence. Dastur Darab and Professor Max Muller are of opinion that the former date is correct.

This Yast is dedicated to the Furohurs and is a glorification of the powers and attributes of the Furohurs in general. On the Farvardigan days the Furohurs "come and go through the Borough—they go along for ten nights asking this:"—(Para. 49.)

"(50). Who will praise us? Who will offer us a sacrifice? Who will meditate upon us? Who will bless us? Who will receive us with meat and clothes in his hands and with prayer worthy of bliss? Of which of us will the name be taken for invocation? Of which of you will the soul be worshipped by you with a sacrifice? To whom will this gift of ours be given that he may have never-failing food for ever and ever?" (Exhibit No. 1.)

Paragraphs 49 to 52 and the concluding paragraphs, more particularly paragraph 157, of the Farvardin Yast, have been very fully discussed before me. Great light is thrown on the meaning of paragraph 50 by the explanatory Exhibit No. 20. It seems from the evidence of the witnesses that all the ceremonies performed during the Farvardigan days take their origin from para. 50, and the concluding paragraphs show that if a Zoroastrian performs these ceremonies the Furohurs "will leave the house satisfied and carry back from here hymns and worship to the Maker Ahura Mazda and the Amesha Sapentas." Exhibit No. 20 is a transcript of the original paragraph into Gujarati characters and then the meaning and the indication of each expression is explained in English. All the witnesses say that Exhibit 20 gives a correct exposition of the meaning of para. 50 of the Farvardin Yast. The plaintiff's counsel complained that it was prepared for the purposes of this case. His original information was that it was prepared by Ervad Sheriarji, but he

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subsequently ascertained that it was prepared by the Advocate-General's Solicitor, Mr. Vimadalal. Nobody ever pretended that it was not prepared for the purposes of the suit.

All I can say of it is that it has been extremely helpful to me in understanding the true spirit of the paragraph, and evidences both knowledge and learning in the party who prepared it.

When the Furohurs come down to the earth during the Farvardigan days and ask for the performance of the ceremonies as mentioned in para. 50 of the Farvardin Yast, they go on to say,

(51) "And the man who offers them up a sacrifice with meat and clothes in his hands, with a prayer worthy of Bliss, the Awful Fravashis of the Faithful satisfied, unharmed and unoffended, bless thus :—

(52) "May there be in this house flocks of animals and men! May there be a swift horse and a solid chariot! May there be a man who knows how to praise God, and rule in an assembly, who will offer us a sacrifice with meat and clothes in his hand and with a prayer worthy of bliss."

There can be no doubt that the performance of certain ceremonies during the Farvardigan days is enjoined as the duty of every true Zoroastrian by Ahura Mazda himself. In the Bahaman Yast, para. 45, Ahura Mazda, speaking directly to Zoroaster, reveals to him in a prophetic spirit that the Farvardigan ceremonies will not be performed with the same devotion they should be performed in the troublous times in the future.

He says to the Prophet :—

(45) "And they practise the appointed feasts of their ancestors, the propitiation of Angels, *and the prayers and ceremonies of the season Festivals and Guardian Spirits* in various places, yet what they practise they do not believe in unhesitatingly ; they do not give reward lawfully and bestow no gifts and alms, and even those they bestow they repent of again." (Exhibit No. 5)

This passage is explained by Dastur Darab as follows :—

"Farvardigan is one of the appointed feasts referred to in the passage ; instead of 'appointed' I would translate the text as 'established.' The original text is Nihatak in Pehlvi, which means established by revelation and followed by the Ancients. The Farvardigan ceremonies are ceremonies which are appointed by the Deity Ahura Mazda and it is the duty of every true Zoroastrian to perform the ceremonies during the period fixed for them. The 'prayers and ceremonies of the season festival' referred to in

the passage are the Ghambars and the prayers and ceremonies of the 'guardian spirits' are the prayers and ceremonies said and performed during the Farvardigan days."

The Bahaman Yast, in which this passage occurs, is the Pehlvi translation of the original Avestaic text, and is dedicated to Bahman, who is one of the Amesha Sapentas. The original Avestaic text is lost, but a translation in Pehlvi has been preserved. The age of the Bahaman Yast is the same as that of the Farvardin Yast. In the Introduction to its translation at page 50 of Vol. V of the "Sacred Books of the East," it is stated that the Bahaman Yast "professes to be a prophetic work in which Ahura Mazda gives Zoroaster an account of what was to happen to the Iranian nation and religion in the future." Farvardigan days and Muktad ceremonies are also referred to in the Dinkard (see Exhibits Nos. 3 and 4); in the Shayast La Shayast (see Exhibit No. 6); and in the Sad Dar (see Exhibits Nos. 7 and 8). There is also a reference to the Farvardigan days in the Patet Pashemani (see Exhibit No. 9). Though the temptation to set out all these passages and comment on them is great, I feel that there would be no limit to this judgment if I yielded to the temptation. Dastur Darab in his evidence has given very clear explanations of these passages, and I must content myself by merely recording that the various passages from the scriptural writings placed before the Court and explained by the witnesses leave no doubt in my mind that the Farvardigan days are the days appointed for the performance of the Muktad ceremonies—that the performance of those ceremonies is enjoined by the religion of Zoroaster—that it is a duty cast on every Zoroastrian by his religion to perform Muktad ceremonies—that the performance of those ceremonies is an act of great religious merit which brings to the man who gets them performed Hathim or Great Reward (Exhibit No. 7), and that the non-performance of them is a great or what is always spoken of as a Bridge Sin (Exhibit No. 8). Exhibit No. 9 is a passage from atet Pashemani (Prayers of Penitence) wherein the non-observance of Farvardigan days and the non-performance of the ceremonies prescribed for those days are referred to as sins for which the man praying expresses his penitence.

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The usual ceremonies to be performed during the Farvardigan days are five in number; (1) The various kinds of Afringans with the Debache preceeding them and the Afrins following them; (2) Baj; (3) Satoom; (4) Furrokshi; and (5) Yejusni. Of these, the Afringans, Baj and Satoom ceremonies are compulsory and must be performed. Dastur Darab thinks the Furrokshi ceremony must also be performed, but Ervad Jivanji says it is performed by some and not by others. Yejusni is a very complicated, long and expensive ceremony, and only the well-to-do members of the community can afford to have them performed and it is optional with Zoroastrians to perform it or not. The Debache of the Afringans precede all the Afringans. It is an invocation of all the Furohurs including those of the persons who are specially mentioned on the occasion. In the Debache, the priests mention the name of the town or city where the prayers are recited and they pray for plenty, joy, victory and happiness. The plenty, joy and happiness prayed for is for the inhabitants of the town or city, and the victory prayed for is the victory of the Sovereign over all his enemies. Ervad Jivanji, in the course of his evidence has told the Court that the benefit or help that is asked of the Furohurs in the prayers offered during the Farvardigan days is asked not only for the individual who invokes such help and asks for such benefit, not only for the whole Zoroastrian community, but for all human beings. Here it may be mentioned that in *all* the prayers recited by a Zoroastrian he never prays for himself alone. He prays for the community and for all peoples quite independently of their being Zoroastrians or otherwise. He is utterly unselfish when he approaches the Almighty and asks for His blessings. He asks them for all, he prays for universal joy, universal prosperity and for the well-being of all men of good life.

The English translation by Bleek of the Debache to the Afringans is given in the third volume of Spiegel's Avesta and marked as Exhibit No. 10 in the case. The different Afringans are described at some length by Dastur Darab in his evidence, and I do not think it is necessary to discuss them here except perhaps to refer to the Afringan Ghambhar, which is not included in any of the Yasts, and which contains prayers for the

Sovereign. Paragraphs 14 to 18 of this Afringan Ghambhar, which is Exhibit 14 in the case, contain solemn prayers for the Sovereign of the country, and for all his Satraps and Vice regents. As translated by Dastur Darab, the prayers begin with the following sentence :—

"In the name of Ahura Mazda the resplendent and glorious, I bless with my prayers the Rulers of the country the Chief of all Rulers of the country."

The prayers then go on to invoke the blessings of the Creator on the Sovereign, and on all his representatives. They contain supplications for his health and his happiness, and pray for his long reign and for victory over all his enemies. These four paragraphs are recited at the end of every *Afringan* and Dastur Darab says that,

"This Blessing on the Rulers and the Chief of the Rulers is quite independent of the Rulers or the Chief Ruler of the Rulers being a Zoroastrian or not. This blessing, whenever recited, would apply to our King Emperor and all subordinate Rulers under the Empire."

Ervad Sheriarji in his cross-examination said,

"It is not correct that in that passage (Exhibit No. 14) Zoroastrian Sovereign is meant. It means any Sovereign—any good Sovereign who reigns wisely, justly and well."

Referring to the same paragraphs, Ervad Jivanji Mody in his cross-examination said :—

"Reading the passage at page 371 (Exhibit No. 14) I say that this does not refer to a Zoroastrian Sovereign alone. It means any Sovereign or Ruler. The passage was recited at the Allbless Bag on the occasion of the Coronation of our present Sovereign, and that shows that every Zoroastrian has understood it in the sense that it refers to Sovereign not necessarily Zoroastrian."

After the Afringan follow the Afrins. They are not the same, like the Debache, but vary with different Afringans. Shortly stated, Afrins are invocations to God to make men pious and virtuous, to send down His Blessings on all mankind. All the five ceremonies are described and explained in Dastur Darab's evidence and I do not propose to discuss them here separately.

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All the ceremonies referred to above have to be performed by priests. From the most ancient times a distinct and separate class, the priests, have existed amongst the Iranians, and their only source of livelihood is the fees they receive from their lay brothers for the performance of religious ceremonies. Some of the officiating priests observe the Burushnoom, and they alone can perform certain ceremonies, whereas the ordinary officiating priests who do not observe the Burushnoom are entitled to perform certain other ceremonies. A certain number of descendants of the priestly class have taken to earning their livelihood in other walks of life, and this class is known amongst the Parsis as Athornans. Messrs. Padshah and Kanga, who have rendered such valuable help in this case are, for instance, distinguished members of that class. Zoroastrian liturgical ceremonies are divided into two classes, the inner and the outer liturgical ceremonies. The inner liturgical ceremonies can only be performed in an Agiary or Atash Behram, and only by priests who have gone through the Burushnoom, and are observing all its requirements. The outer liturgical ceremonies are ceremonies which can be performed outside an Agiary or Atash Behram, that is, at the private residences of the members of the community, and can be performed by priests who are not observing the Burushnoom. The main distinction is not so much in the place as in the priest performing the ceremony, for even the inner liturgical ceremonies may be performed in a private residence if there is a separate place which is cleansed, purified, and temporarily consecrated for the performance of those ceremonies—but in no event can they be performed by any priests other than those who are observing the Burushnoom. The inner liturgical ceremonies are the Yejushni, Baj, Vendidad and Visparad. The outer liturgical ceremonies are the Afringans, Furrokshi and Satoom.

An officiating priest must go through the Nahan and Martab ceremonies. No layman is allowed to go through these ceremonies—the man going through these ceremonies must be a member of the priestly class.

Ervad Sheriarji says :

"From the most ancient times—from the time of Herodotus, the priests as a separate class have existed amongst the Zoroastrians. They were called

the Magi, and in the performance of religious ceremonies the presence of a Magus was always necessary. There is historical evidence of this in existence. Herodotus wrote about the customs prevailing amongst the Zoroastrians in his own times, which was 400 B. C." See Rawlinson's Herodotus, Vol. I, pages 217 and 218.

Dastur Darab, in the course of evidence, said that with the exception of Baj and Yejusni a layman may perform the other ceremonies if he is very poor. He said if a man can afford it he must employ a priest, because a priest is supposed to be more pious and is more conversant with the ceremonies. This led to a little misunderstanding, which was cleared up when Dastur Darab explained that what he meant was that it is a duty cast upon every Zoroastrian to get these or some of these ceremonies performed by the priests during the Muktad days, and that the non-performance of them was a great sin. Where a Zoroastrian is so situated that no priest is available or where he is so poor that he cannot afford to employ a priest, rather than not have them performed he ought, in the opinion of the witness, to try and perform them himself. He admitted that he had never known a layman perform these ceremonies. Whatever may be Dastur Darab's opinion on this point, the fact remains that from the most ancient times the Magi in the olden times and the Mobeds or priests in the more recent times, have always performed these ceremonies, and the scriptures of the Zoroastrians contemplate that they shall be performed by the priests. For instance, the very Debache of the Afringan shows that that ceremony is performed by the priest, for, at the very outset, the priest says :— 'I have performed the offering. I have offered the Daruns. I now offer the Mayazd."

No layman could say : "I have performed the offering and I have offered the Daruns."

It has been the universal practice existing amongst the Zoroastrians for centuries that all the Muktad ceremonies should be performed by the priests and to this there never has been known a single exception.

The priests, as a rule, are wholly dependent for their livelihood and for the maintenance of themselves and their families on

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the fees they get from their lay brethren for the performance of their religious ceremonies. The Farvardigan days being continuous—the Muktad ceremonies being regarded as the most sacred—and this period being the most holy amongst the Zoroastrians, the priests during these days make a far larger income than they do at any other period during the year. The fees received during the Muktad days are one of the principal sources of a priest's income during the year. The observance of the Muktad holidays helps very considerably towards the maintenance of the priestly class.

The observance of the Farvardigan days and the performance of the Muktad ceremonies have come down to the Parsis of the present day from times immemorial. That these Farvardigan days were observed in the ancient times in Persia, Ervad Jivanji proves by Exhibit No. 26. It seems that in the year A. D. 575, Emperor Justin of Rome sent an embassy to King Noshirwan of Persia, otherwise known as Khooshroo the first. The Persian King asked the embassy to wait, as he was then engaged in observing the Farvardigan days.

Exhibit No. 27 is an extract from the works of an Arabic author named Alberuny, who flourished about 1000 A. D. This passage shows that the Muktad ceremonies were well known and duly performed by the Zoroastrians at and previous to the time the Arabic author wrote his "Chronology of Ancient Nations."

We have seen in the *Wadia* case that as far back as 1826 a Parsi created a Trust for the performance of Muktad ceremonies.

Besides the recitation of prayers during the performance of the various Muktad ceremonies—fruit, flowers, cooked food and Darun or consecrated bread and clothes, are used in the performance of some of these ceremonies. Ervad Jivanji in his cross-examination explains the object. He says:—

"The original object of using food and clothes was to prepare food and clothes and distribute them amongst the poor. Fruits and flowers are also used in the performance of the ceremonies. The idea is that the party praying says: 'These are some of thy best gifts to us, O God, and we place them before you and offer them to you as our humble offerings.' The food and clothes are offered to all forming the Celestial Hierarchy—the Almighty—the Amesha Sapentas -the Izuds and the Furohurs. The food

is *not* offered to the souls of the dead, but to the Fravashis and other Higher Intelligencies. Clothes are consecrated only in the Baj ceremony. Cooked food, flowers and fruits are placed before the priests performing the Baj—the Afringan and the Satoom ceremonies, and only consecrated bread (Darun) is used in the performance of the Yejushni ceremony."

The evidence recorded in the case covers many points both of importance and interest, but it is not possible to discuss all of them within the limits of a judgment which I am afraid is already too long, and I must leave the evidence to speak for itself and proceed to summarise my findings thereon. In considering the evidence, it must be remembered that the witnesses who give evidence before the Court were speaking from the scriptures written in dead languages—they were elucidating many very abstruse and elliptical passages—and they were giving the results of patient and laborious research over a vast amount of literature written in the ancient languages. The perfect unanimity prevailing amongst them lends great weight to their depositions, and there can be no doubt that their evidence is perfectly accurate and thoroughly reliable.

I find from the evidence that the Farvardigan days are the most holy days during the Zoroastrian year, and that the performance of Muktad ceremonies during the Farvardigan days is enjoined by the scriptures of the Zoroastrian religion. In para. 20 of the Farvardin Yast, Ahura Mazda commands Zoroaster in times of danger or difficulty to invoke the help of the Furohurs—who are the active helpmates of the Creator and with whose assistance he wages a continuous and successful war against the Evil Spirit.

These Furohurs come down to the earth and express a desire for the performance of certain ceremonies during the Farvardigan days. These expressions of desire on the part of the holy Furohurs have been interpreted to be commands which a faithful Zoroastrian is bound to obey. The ceremonies to be performed are indicated by the Furohurs, and the followers of the Zoroastrian religion have, from the most ancient times, been known to perform these ceremonies and to recognise the non-performance of them as a sin for which they ask forgiveness in the peniten-

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tial prayers—the Patet Pashemani. In the ancient religious writings the Farvardigan days are constantly referred to. They are the Season festival—the most sacred festival in the Zoroastrian calendar. It is established by historical evidence that these ceremonies were performed in ancient Iran from the most olden times, and the Parsis after their domicile in India have continued to perform them. The performance of the Muktad ceremonies is, I find, a *religious duty* imposed upon the Zoroastrians by the proved tenets of the religion they profess.

I further find that the ceremonies themselves are acts of religious worship. They include worship, praise and adoration of the Supreme Deity, and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well-being and long reign of the Sovereign, for good Government by him, and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and there can be no doubt, on the evidence before the Court that the performance of these ceremonies is an act of *Divine Worship* in its highest and truest sense.

I also find that the moneys paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

I also find that, according to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live, and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator. Every right-minded human being—be he a Zoroas-

trian, Christian, Mahomedan, Hindoo or Jew, believes in the efficacy of prayers prescribed by the religion he professes, and even the most indifferent and callous of them approaches the Almighty and resorts to prayers in times of sickness, difficulty or distress. Any doubt or scepticism as to efficacy of prayers addressed to the Almighty would be, to my mind, an unmistakeable sign of debased and degraded human nature.

Having found the facts as set out above the only question that now remains to be discussed is whether the Trust created by Bai Dinbai for the performance of Muktad ceremonies is valid in law. Ever since Westropp, J., delivered the judgment of the Appeal Court in *Naoroji Beramji* v. *Rogers* [1], wherein he said that the law uniformly applied to Parsis *and their property* before the legislation of 1865 was English law and that the law applicable to *that particular case* was English law (see pages 11 and 12 of the Report), it has been the fashion at the bar to assume, that English law applied to Parsis in *all* matters. In the early stages of the case I expressed some doubt as to whether English law applied to the customary religious rites and ceremonies of the Parsis and to their religious institutions. Mr. Bahadhurji has been at great pains to discuss before me almost every Parsi case both before and after the decision I have referred to, and the discussion has been most valuable as showing that it is by no means correct to make an unqualified statement that English law applied to Parsis in *all* matters as would appear from various decisions of our Court since Westropp, J., decided the case of *Naoroji* v. *Rogers* [1] in which it was held that in those cases English law did not apply to the Parsis. See *Dhanjibhai* v. *Navazbai* [2]; *Mithibai* v. *Limji Nowroji Banaji* [3]; *Peshotam* v. *Meherbai* [4]; *Byramji Bhimjibhai* v. *Jamsetji Nowroji Kapadia* [5]; and *Shapurji* v. *Dossabhoy* [6]. However interesting or important this discussion may be, on a fuller consideration of the case now before me, I have come to the conclusion that for

(1) (1867) 4 B. H. C. R. (O. C. J.) 1.
(2) (1877) 2 Bom. 75.
(3) (1881) 5 Bom. 506: on appeal (1881) 6 Bom. 151.
(4) (1888) 13 Bom. 302
(5) (1892) 16 Bom. 630.
(6) (1905) 30 Bom. 359.

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present purposes it is wholly unnecessary to discuss this question here. I will proceed with the consideration of the question as to whether this is a valid Trust in law or not on the basis that English law applied to this trust. Once the nature of the ceremonies for which the trust is created is clearly understood the question of law presents no difficulty whatever.

At the outset it is as well to observe that the English law of Mortmain does not extend to British India. For this the Privy Council decision in the case of the *Mayor of Lyons* v. *East India Company* (1), is a very clear authority.

In England the Statute I of Edward VI., Chapter 14, known as "The Act for Chantrie's Collegiate" made certain existing religious trusts void and on the analogy of that Statute all trusts that followed the passing of that Statute and were analogous to those declared void by it were also held to be void. This policy of the Law is spoken of as the Doctrine of Superstitious Uses, and it is well established by a series of decisions, that this doctrine is not extended to India and has no application to Trusts relating to religion created in India. See *Advocate-General* v. *Vishvanath Atmaram*(2); *Andrews* v. *Joakim*(3); *Joseph Ezekiel Judah* v. *Aaron Hye Nusseem Ezekiel Judah* (4); and *Yeap Cheah Neo* v. *Ong Cheng Neo* (5).

It is quite clear that it cannot be argued that the Trust in this case is void because it falls under the Doctrine of Superstitious Uses. It is argued, however, that the Trust is bad because it offends against the Rule of Law which forbids the locking-up of property in perpetuity. The rule against perpetuity, there is no doubt, is a well-established Rule of Law and is enforced in India, as in England, with equal rigour. In *Cooper* v. *Laroche*(6) Vice-Chancellor Malins says: "there is no rule of law in England more absolute than that all property, whatever may be its nature, real or personal, must be absolutely vested in some person, and be alienable within a life in being and twenty-one years after."

(1) (1836) 1 Moo. I. A. 175.
(2) (1855) 1 Bom. H. C. R. Appx. ix.
(3) (1869) 2 Ben. L. R. (O. C. J.) 148.
(4) (1870) 5 Ben. L. R. (O. C. J.) 433.
(5) (1875) L. R. 6 P. C. 381.
(6) (1881) 17 Ch. D. 368 at p. 372.

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Section 14 of the Transfer of Property Act now enacts this rule as substantive law in India. It is, however, an equally well-established Rule of Law that this rule against perpetuities does not apply to Charitable Trusts. This exception to the rule is reproduced in section 17 of the Transfer of Property Act which enacts that the restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the *Advancement of Religion*—Knowledge—Commerce—Health—Safety or any other object beneficial to mankind. Although the Transfer of Property Act does not apply to the Trust in this case, its provisions are the reproduction of the Law as it existed before the Act was framed and passed, and are a useful guide in considering the question before me.

This exception in favour of Charitable Trust, is fully recognised in English law. In *In re Bowen*(1) Stirling, J., says :—

"Property may be given to a charity in perpetuity."

In Tudor on Charities and Mortmain, 4th Edition, at page 131, it is said :—

"This exception from the rule against perpetuities is well established. It is founded upon grounds of public policy, and is essential to the useful existence of Charitable Trusts."

"In order, however, to have the benefit of the exemption from the rule against perpetuities, a Trust must be charitable within the meaning which the law assigns to that term."

Tudor, at page 35 of the 4th edition, most admirably sums up the result of numerous authorities as to what in law is the meaning of Charity, in the following passage :—

"The word 'charity' has a technical meaning in English law, which can now only be defined by a reference to the Statute 43 Eliz. ch. 4." Its preamble enumerates "a list of charities so varied and comprehensive that it became the practice of the Court to refer to it as a sort of index or chart. The objects enumerated in the preamble have in fact been treated as instances, the result being that 'those purposes are charitable which the statute enumerates or which by analogies are deemed within its spirit or intendment.' There is, moreover, one thread which connects the whole of the objects enumerated thereby, namely, 'the consideration whether, in order to fall within the Act, the gift was, as had been said, a gift for general public use which extended to the poor as well as to the rich'."

(1) [1893] 2 Ch. 491 at p. 494.

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One of the purposes which have been held charitable within the language or spirit of this preamble is "advancement of religion."

In England on a review of the cases relating to Religious Trust, it will be found that Religious Trusts or Trusts relating to religion have been held void either as being forbidden by law or as falling under the doctrine of superstitious uses. In England there is an established Church. In India we have no established Church. By some of the older statutes churches for certain denominations of Christians were established in India and supported from the revenues of the country, but that was merely for the purpose of encouraging Christians to go out to the country and for the convenience of such Christians as came and settled either temporarily or permanently in India. In this country we have unfettered religious toleration. Every one is entitled to profess openly the religion he believes in. In the eye of the Law in India all religions are alike, and it follows therefore that each religious community professing a particular religion, and for the matter of that each member of such community, is entitled as of right to do anything that to him may seem right for the maintenance and advancement of the religion which the community or individual member thereof professes and follows.

Now, is this a Charitable Trust in the legal sense of the word Charitable? Mr. Justice Chitty in *In re Foveaux*, [1] says:—

"Charity in law is a highly technical term. The method employed by the Court is to consider the enumeration of charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done *is to consider each case as it arises, upon it own special circumstances.* To be a charity there must be *some* public purpose—something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular district will suffice."

This case is useful on other points in the present case, and therefore I think it would be convenient to notice that it was

[1] [1895] 2 Ch. 501 at p. 504.

here held that societies for the suppression and abolition of vivisection were charities within the legal definition of the term Charity. The learned Judge concluded his judgment by observing:—

"The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether, if they achieved their object, the community would, *in fact*, be benefited is a question on which I think the Court is not required to express an opinion."

Having regard, then, to the technical meaning ascribed to Charity in law, I propose now to consider a few cases which throw light on the question now before the Court, showing what Religious Trusts are held to be good Charitable Trusts, and as such exempt from the application of the rule against perpetuities. It must be remembered that in England, after the Reformation, persons who differed from the established religion—such as Protestant Dissenters, Roman Catholics and Jews, were held to be obnoxious to the law, everything that was calculated to have for its object the propagation of the rights of a religion not tolerated by the law was included in the comprehensive expression "superstitious use," and all gifts for superstitious purposes or uses were held to be contrary to the Policy of the Law and therefore illegal. Those cases, therefore, in the English Reports declaring religious trusts of various kinds to be invalid, as being trusts for superstitious uses, have no application whatever to the present case. Religious Trusts in India have a much greater analogy to Religious Trusts in Ireland since the disestablishment of the Church in that country in 1869 by 32 and 33 Victoria, chapter 42. Of course, in later years in England many enabling and relieving Acts have been passed, and many disabilities against those who are not members of the established Church have now been removed, but still these relieving Acts do not repeal the whole law of Superstitious Uses, and the doctrine still holds sway—although in the present time to a limited extent even in England.

A large number of authorities on many points closely connected with the question in this case have been cited before me, but as I said before, I propose to discuss only a very few

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of them, with a view to see what trusts in connection with religion, religious observances, and religious and other beliefs have been held valid in England and Ireland.

In *Powerscourt* v. *Powerscourt*(1), a Testator by his will devised £ 2,000 to Trustees in trust to lay out the sum at their discretion until his son came of age, "in the Service of my Lord and Master, and I trust Redeemer."

This bequest was held to be a good and valid bequest to charity and was ordered by the Court to be carried into effect. This is an Irish case, but in 1895 in the case of *Farquhar* v. *Darling*(2), Mr. Justice Stirling refers to this case with approval and follows it. There the Testatrix bequeathed the residue of her property "to the poor and to the *service of God*." Mr. Justice Stirling in giving judgment says :—

"I have to construe this will according to the ordinary meaning of the language as used by English testators ; and I think that when 'the service of God' is spoken of as it is in this will, no one so construing the expression would hesitate to say that service in a religious sense was intended."

The learned Judge then quotes a passage from the judgment of Lord Manners, L. C., in *Powerscourt* v. *Powerscourt*(1) and concludes his judgment in these words :—

"It has not been disputed before me that a bequest for religious purposes is a good charitable bequest ; and, on the authority of the case to which I have just referred, as well as upon my own view of the true construction of the will, I hold that the residuary estate is well given to charitable purposes."

In *Webb* v. *Oldfield* (3), a Testator devised a portion of a perpetual yearly rent to two Vegetarian Societies in equal moieties for the use of the said societies, to be paid to them for ever.

The Master of the Rolls held that the objects of those Societies might be fairly described as charitable within the principle of decided cases, and that there was a valid gift to the two societies in equal moieties, and the Court of Appeal affirmed the decision.

(1) (1824) 1 Molloy 616. (2) [1896] 1 Ch. 50.
(3) [1898] 1 I. R. 431.

In *Straus* v. *Goldsmid* (1), the Court in England had before it the will of a Testator professing the Jewish religion. He bequeathed a third of the residue of his estate to the Rulers and Wardens of the Great Synagogue in the City of London, with directions to them to utilise the interest and dividends of the said third of the residue every year on the eve of Passover in distributing, at least amongst 10 worthy men . . . to purchase meat and wine fit for the service of the two nights of Passover. The Vice-Chancellor held that the bequest, being intended to enable persons professing the Jewish religion to observe its rites, was good, and the Trust was upheld.

In *Attorney-General* v. *Stepney* (2), a bequest of the residue of personal estate for the "increase and improvement of Christian knowledge and promoting religion," was held by Lord Eldon to be good charitable bequest, as it had for its object a General charitable purpose of promoting Christian knowledge.

In a later case, *Baker* v. *Sutton* (3), the Master of the Rolls, Lord Langdale, refers to this case and follows it. In this case the testator made a bequest of the residue of his personal estate for "such religious and charitable institutions and purposes within the Kingdom of England as in the opinion of the testator's trustees should be deemed fit and proper." The Master of the Rolls, in the course of his judgment, observes (at p. 233) :—

"All the cases, with one exception, go to support the proposition, that a religious purpose is a charitable purpose. In the *Attorney-General* v. *Stepney* (2). . . Lord Eldon assumes throughout his Judgment, *that a religious purpose was a charitable purpose* . . . I am of opinion that the bequest, in the present case, for such religious and charitable institutions and purposes as the trustees should think fit, is a good charitable gift."

Townsend v. *Carus* (4) is another case in which a Testatrix bequeathed a legacy to Trustees "upon trust to pay, divide or dispose thereof, unto or for the benefit or advancement of such societies, subscriptions or purposes, having regard to the Glory of God in the spiritual welfare of His creatures, as they shall in their discretion see fit." This gift was construed to be a gift

(1) (1837) 8 Sim. 614.
(2) (1804) 10 Ves. Jun. 22.
(3) (1836) 1 Keen 224.
(4) (1843) 3 Hare 257.

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of them, with a view to see what trusts in connection with religion, religious observances, and religious and other beliefs have been held valid in England and Ireland.

In *Powerscourt* v. *Powerscourt*(1), a Testator by his will devised £ 2,000 to Trustees in trust to lay out the sum at their discretion until his son came of age, "in the Service of my Lord and Master, and I trust Redeemer."

This bequest was held to be a good and valid bequest to charity and was ordered by the Court to be carried into effect. This is an Irish case, but in 1895 in the case of *Farquhar* v. *Darling*(2), Mr. Justice Stirling refers to this case with approval and follows it. There the Testatrix bequeathed the residue of her property "to the poor and to the *service of God*." Mr. Justice Stirling in giving judgment says :—

"I have to construe this will according to the ordinary meaning of the language as used by English testators ; and I think that when 'the service of God' is spoken of as it is in this will, no one so construing the expression would hesitate to say that service in a religious sense was intended."

The learned Judge then quotes a passage from the judgment of Lord Manners, L. C., in *Powerscourt* v. *Powerscourt*(1) and concludes his judgment in these words :—

"It has not been disputed before me that a bequest for religious purposes is a good charitable bequest ; and, on the authority of the case to which I have just referred, as well as upon my own view of the true construction of the will, I hold that the residuary estate is well given to charitable purposes."

In *Webb* v. *Oldfield* (3), a Testator devised a portion of a perpetual yearly rent to two Vegetarian Societies in equal moieties for the use of the said societies, to be paid to them for ever.

The Master of the Rolls held that the objects of those Societies might be fairly described as charitable within the principle of decided cases, and that there was a valid gift to the two societies in equal moieties, and the Court of Appeal affirmed the decision.

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for religious purposes, and as such valid and restricted to such purposes. The Vice-Chancellor refers in his judgment to the case of *Baker* v. *Sutton*[1], which I have discussed immediately above, and says :—

"If this is a bequest for religious purposes, I think I am bound to hold it a charity within the decided cases. The cases referred to in *Baker* v. *Sutton* (1), and that case itself, are sufficient authorities on this point."

Another very instructive case is that of the *Attorney-General* v. *Lawes*[2]. In that case the testatrix by her will gave directions to her executors "to pay unto Messrs. Drummonds, Bankers, a clear yearly sum of £100 for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who may be persecuted, aggrieved, or in poverty for preaching or upholding those doctrines, or half the sum may be appropriated for the benefit of the church founded by the late Edward Irving in Newman-Street."

This bequest was held by the Court to be a valid charitable bequest of a *perpetual* annuity. The Vice-Chancellor, at the close of counsel's argument, observed that the bequest was not the less a charitable bequest from the fact that it was given *for the benefit of a limited class of persons*—that it was not the number of the objects which made the distinction between a public and private charity—that it was not the less a charity because it was confined to those members of a particular class of persons who were subject to certain grievances and not to the class at large.

In Re Michel's Trust [3] is a case of great use in considering the question now before the Court. The testator, Abraham Michel a Jew, by his will bequeathed so much money as would produce £10 a year upon trust to pay the said sum of £10 every year to three persons to learn in their Beth Hammadrass or College two hours daily—and on every anniversary of the Testator's death to say the prayer called in Hebrew "*Candish*," which is a

(1) (1836) 1 Keen 224. (2) (1849) 8 Hare 32.
(3) (1860) 28 Beav. 39.

short Hebrew prayer in praise of God and expressive of resignation to His will. Many of the disabilities relating to Jews residing in England were removed by 9 & 10 Vic. c. 59, s. 2, which provided that "from and after the commencement of this Act Her Majesty's subjects, professing the Jewish religion in respect to their schools—places for religious worship, education and charitable purposes, and the property held therewith, shall be subject to the same laws as Her Majesty's Protestant subjects dissenting from the Church of England are subject to, and not further or otherwise." Although the testator died in 1821 the case does not seem to have come before the Court till 1865. The Master of the Rolls, Sir John Romilly, held that the statute had a retrospective effect and applied to this will. The bequest was sought to be defeated by the residuary legatee on the ground, first, that "the gift was void as a superstitious use, as an anniversary or obit, and was similar to praying for the testator's soul"; and, secondly, on the ground that the gift was invalid as "tending to a perpetuity." In delivering judgment, the Master of the Rolls made the following very important observations:—

"I have no doubt of the validity of this bequest, and it is therefore the duty of this Court to carry it into effect . . . I see nothing in the bequest which is superstitious . . . *If it be part of the forms of their religion*, that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that, as a religious ceremony practised by a dissenting class of religionists, it could be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question . . . . I think that this is a valid gift for the benefit of a Jewish charity."

I will next consider the very peculiar case of *Thornton* v. *Howe*[1]. In this case the Testatrix Ann Essam bequeathed the residue of her estate both real and personal, in trust, "for printing, publishing and propagating the sacred writings of Joanna Southcote." The Heiress-at-Law of the Testatrix filed a Bill for a Declaration that the trust was void in law. She charged that the writings of Joanna Southcote. . . purport to declare, maintain or reveal that she was with child by the Holy Ghost and that a second Messiah was about to be born of her body, and that her

(1) (1862) 31 Beav. 14.

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writings were of a blasphemous and profane character, and that the trust was for the propagation of doctrines subversive of or contrary to the Christian religion. The Master of the Rolls, Sir John Romilly, before giving Judgment, himself studied the works of Joanna Southcote. He came to the conclusion that she was a foolish ignorant woman, of an enthusiastic turn of mind. He said he had found much in her writings that in his opinion was very foolish, but there was nothing in them that was likely to make persons who read them immoral or irreligious, and he declined to declare the devise of the testatrix as invalid by reason of the tendency of the writings of Johanna Southcote. In the course of his Judgment the Master of the Rolls has made some very weighty observations, which are of considerable importance in this case. He says (at p. 19) :—

"I am of opinion, that if a bequest of money be made for the purpose of printing and circulating works of a religious tendency, or for the purpose of extending the knowledge of the Christian religion, that this is a charitable bequest. . . the Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests. Neither does the Court, in this respect, make any distinction between one sect and another. It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void . . . But if the tendency were not immoral, and *although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation*, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests."

Lord Macnaghten in the great Judgment he delivered in the House of Lords in the case of the *Commissioners for special purposes of Income Tax* v. *Pemsel*[1], says :—

" That according to the law of England a technical meaning is attached to the word 'charity' and to the word 'charitable' in such expressions as 'charitable uses,' 'charitable trusts' or 'charitable purposes,' cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or Trusts form a distinct head of equity. Their distinctive position

(1) [1891] A. C. 531 at p. 580.

is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void. . . In Ireland, though neither the Statute of Elizabeth nor the so-called Statute of Mortmain extended to that country, the legal and technical meaning of the term 'charity' is precisely the same as it is in England."

His Lordship then goes on to enunciate the four principal heads under which he divides charities. He says :—

"'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty ; trusts for the advancement of education ; *trusts for the advancement of religion* ; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

I have merely referred to the cases cited above and culled out passages from the various judgments and set them out without any comment of my own ; firstly, because I am oppressed by a feeling that this judgment is already exceeding the length to which an ordinary judgment should go ; and secondly, because it seems to me that the importance and the applicability of these cases to the present one are so obvious that they require no comment from me.

There is one other case of paramount importance but, before I refer to it, I think it would be convenient here shortly to notice the cases on which the plaintiff's counsel relies in support of his contentions against the validity of the Trust in this case.

The case on which Mr. Tarachand chiefly relies is that of *West* v. *Shuttleworth*(1). In this case the testatrix directed several sums of money to be paid to several Roman Catholic priests and chapels and desired that they might be paid as soon as possible after her death so that she might have the benefit of their prayers and Masses. These bequests formed one branch of the case. The other branch related to a bequest of the residue of her property to Trustees upon trust to pay £10 each to the ministers of certain specified Roman Catholic chapels for the benefit of their prayers for the repose of her soul and that of her deceased husband, and the remainder was directed to be appropriated in such a way, as the trustees might judge best, as would be calculated to promote the knowledge of the Catholic Christian

(1) (1835) 2 My. & K. 684.

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religion amongst the poor and ignorant inhabitants of two towns in the County of York mentioned by the testatrix. These bequests were attacked on two grounds. It was contended that the legacies to the priests and chapels were void as being for superstitious uses, and it was argued that the gift of the residue was also void in law as being for the express purpose of promoting the Roman Catholic religion. As there has been a difference of opinion between counsel as to the precise grounds on which this case was decided, I cannot do better than give the grounds of the decision in the words of the Master of the Rolls in the Judgment itself. He says (at p. 697):—

"There can be no doubt that the sums given to the priests and chapels were not intended for the benefit of the priests personally, or for the support of the chapels for general purposes, but that they were given, as expressed in the letter, for the benefit of their prayers for the repose of the testatrix's soul and that of her deceased husband; and the question is, whether such legacies can be supported.

"The legacies in question, therefore, are not within the terms of the statute of Edward VI, but that statute has been considered as establishing the illegality of certain gifts, and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in *Duke*, been decided to be *within the Superstitious Uses* intended to be suppressed by that statute. I am therefore of opinion that these legacies to priests and chapels are void."

These words can leave no room for doubt that the legacies in question forming the first branch of the case were held to be void as being gifts for superstitious uses "although not coming within the statute relating to superstitious uses." See *Yeap Cheah Neo* v. *Ong Cheng Neo*[1]. The question involved in the second branch of the case, relating to the gift of the residue, involved the consideration of the provision of Statutes 2 & 3 Will. IV, c. 115. The Master of the Rolls, after discussing the provisions of the statute and certain decided cases, said that they left no doubt in his mind of the validity in law of the gift of the residue. How the decision of this case, holding the gifts to priests and chapels void because they were construed to be gifts for superstitious uses, can help the plaintiff in this case, I fail to understand. As shown above, the doctrine of superstitious uses

(1) (1875) L. R. 6 P. C. 381.

has no applicability whatever to religious trusts in this country, and I must confess I see nothing in this case to help the plaintiff in his contentions. If anything, this case is indirectly of use to the contentions of the defendants, because, in the first place the bequest of the residue for promoting the Roman Catholic religion is held valid, and the words of the Master of the Rolls lead one to believe that if the gifts involved in the first branch were "intended for the benefit of the priests personally or for the support of the chapels for general purposes," the result might have been different. I can understand the plaintiff's counsel's reasoning if he merely wishes to make use of the case as showing that a gift for prayers for the repose of the soul of the donor or those connected with the donor is bad in law. It is not necessary for the purposes of the case to consider that question at all. Nobody has argued before me that gifts for the purpose of saying prayers for the repose of the souls of the dead are good gifts in law. The whole force of the defendant's fight is directed towards proving that the present Trust is *not* a trust for the purpose of saying prayers for the repose of the souls of the dead, and I think they have succeeded in proving that beyond a shadow of doubt.

The next case on which Mr. Tarachand relied was that of *Heath* v. *Chapman*[1]. In this case there were trusts declared for certain Roman Catholic chapels, for saying Masses and requiems for the souls of donor and for other souls, and for the souls of the "poor dead" and for other pious purposes. It was held that gifts for Masses, etc., for the dead were superstitious and void—that the pious uses could not—as religious uses—be separated from the others and were therefore also bad, and that the words pious uses could not be construed charitable uses—consequently the property given to these uses went to the Residuary Legatee of the donor. *West* v. *Shuttleworth*[2] was in this case followed. This case again does not help the plaintiff in the least, for the same reasons as apply to *West* v. *Shuttleworth*.[2]

The case of *West* v. *Shuttleworth*[2] is often cited and is referred to in many subsequent cases, and before leaving the consider-

(1) (1854) 2 Drew 417. (2) (1835) 2 My. & K. 684.

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ation of the case and passing on, it would be interesting to note that in *In re Blundell's Trusts*,[1] twenty-five years after its decision, Sir John Romilly, Master of the Rolls, expresses doubts as to the soundness of that decision in the following words :—

"I expressed my difficulty, in the case referred to, as to whether gifts for religious ceremonies practised by a dissenting class of religionists might not be permitted, if not opposed to public morality ; but I think the decided cases too strong, and that the House of Lords alone can alter the settled law. It is clear that I must act on *West* v. *Shuttleworth*[2], which I cannot overrule."

The next case relied on by Mr. Tarachand is that of *Colgan* v. *The Administrator-General of Madras* [3]. This was a case in which the Court had to consider the disposition made by an Armenian lady by her will, and the Appeal Court in Madras held that a bequest for perpetual Masses for the benefit of the soul of the testatrix and for souls in purgatory was void as infringing the rule against perpetuities. This case was decided in 1892. The same remarks that I have made with reference to *West* v. *Shuttleworth*[2] and *Heath* v. *Chapman*[4] apply to this case. This case is also open to the further remark that after the decision in 1906 of the case of *O'Hanlon* v. *Logue*[5] by the Court of highest jurisdiction in Ireland—to which case I will presently refer—it seems to me now to be quite certain that the decision in this case that bequests in perpetuity for the celebration of Masses are void is not good law, and no Court in India will or can follow the case or regard it as a correct decision on this subject.

The last case on which the plaintiff's Counsel relies and which is his sheet anchor, is the case of *Yeap Cheah Neo* v. *Ong Cheng Neo*[6]. As the case is treated by Mr. Justice Jardine in *Limji Noworoji Banaji* v. *Bapuji Ruttonji Lixbuwalla*[7] as an authority in "approaching the question of law," I think it is desirable to consider with care what bearing this decision of their Lordships of the Privy Council has on a

(1) (1861) 30 Beav. 360 at p. 362.
(2) (1835) 2 My. & K. 684.
(3) (1892) 15 Mad. 424.
(4) (1854) 2 Drew 417.
(5) [1906] 1 I. R. 247.
(6) (1875) L. R. 6 P. C. 381.
(7) (1887) 11 Bom. 441.

trust created by a Parsi in India. The testatrix whose will was under consideration was a Chinese lady who had taken up her residence in Penang in the Straits Settlement. This tract of country was ceded by a Native Prince in or about 1807 to the East India Company. It was then wholly uninhabited. The Company built a fort and a town, and a number of Chinese, Malays and Indians settled there. The place had no original or indigenous peoples of its own and consequently there were no customs or usages which could be said to have been in vogue amongst the people of the land. Amongst the points decided by the Privy Council in the case, those that are supposed to affect the question in the present case are two, namely:—

(1) That a devise of two plantations in which the graves of the family were placed, to be reserved as a family burying-place and not to be mortgaged or sold, was void as a devise in perpetuity and (2) that a direction that a house for performing religious ceremonies to the testatrix and her late husband be erected, was void, as being a devise in perpetuity, which was not for a charitable use.

Mr. Justice Jardine, referring to *Yeap Cheah Neo* v. *Ong Cheng Neo*[1], says:—

"Their Lordships' observation appears applicable to Parsis in Bombay. 'In this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for Masses for the dead, or as the Christian of any Church who may have devised property to maintain the tombs of deceased relatives.'"

A careful perusal of the paragraph at page 396 of the report from which this sentence is picked out, shows conclusively that what their Lordships said was that, according to English Law prevailing *in England*, the gifts they were considering would be analogous to gifts for Masses or for the upkeep of tombs, and such gifts being gifts merely for pious uses would be void *as being gifts for Superstitious Uses*. That this is without doubt so will be seen by the observations of their Lordships which immediately precede the sentence in question. They say:—

"The performance of these ceremonies is considered by the Chinese to be a pious duty . . . . The dedication of this Sow Chong House bears a close analogy to gifts to priests for Masses for the dead. Such a gift by a Roman

(1875) L. R. 6 P. C. 381.

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Catholic widow of property for Masses for the repose of her deceased husband's soul and her own, was held in *West* v. *Shuttleworth*(1) not to be a charitable use, and although not coming within the statute relating to superstitious use, to be void."

The concluding sentence of their Lordships in this paragraph is—

"All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to *such objects*."

These and similar gifts, although not falling strictly within the letter of the statute of Edward VI, have nevertheless been held void as in *West* v. *Shuttleworth*(1), as being within the spirit and intendment of the statute, and being analogous to those mentioned in the statute, fell within the purview of the Doctrine of Superstitious Uses, which took its origin from the statute and became applicable to certain trusts for pious uses on grounds of public policy. This doctrine has *no applicability whatever* to trusts in India, and therefore, with great deference to the learned Judge, I venture to say that their Lordships' observation in *Yeap Cheah Neo* v. *Ong Cheng Neo*(2) quoted by him, has *no* applicability to Parsis in Bombay or to the trusts created by them.

That it was possible that their Lordships' decision might have been different if they had evidence before them proving the usage and customs prevailing amongst the Chinese community at Penang, appears from the observations in the judgment at page 395, where they say :—

"The devise of the two plantations. . . is plainly a devise in perpetuity. The only question is whether it can be regarded as a gift for a Charitable use. The weight of authority is against a devise of this nature being so held in the case of an *English* will; and the only point, therefore, requiring consideration can be, whether there is anything in Chinese usages with regard to the burial of their dead, and in the arrangements for that purpose at Penang, which would render such an appropriation of land beneficial or useful to the public. It is to be observed that the extent of the plantations nowhere appears, and it may be they contain more land than would be required for the purpose of a family burial ground. In the absence of any information respecting usages of the kind adverted to, and of the extent of these plantations, their Lordships feel unable to say that the decree on this point is wrong."

(1) (1835) 2 My. & K. 684. (2) (1875) L. R. 6 P. C. 381.

Side by side with *Yeap Cheah Neo* v. *Ong Cheng Neo*[1], Mr. Justice Jardine refers to *Fatmabibi* v. *The Advocate-General of Bombay*[2]. In his judgment in that case Mr. Justice West refers to *Yeap Cheah Neo* v. *Ong Cheng Neo*[1], and it is most instructive to notice his observations as to that case and its applicability to trusts in India. At page 50 of the report his Lordship observes :—

"As to the ultimate trust for constructing wells and aiding marriages and pilgrimages, the case of *Neo* v. *Neo* shows that the rule against perpetuities extends to a Colony where the English Law is enforced *only so far as that law is adapted to the circumstances of the community*, because it is regarded as having its foundation in principles of general application. But it is subject to exception in the case of 'Charities' liberally construed as objects 'useful and beneficial' to the community. But useful and beneficial in what sense? The Courts have to pronounce whether any particular object of a bounty falls within the definition; but they must in general apply the standard of *Customary Law* and *common opinion amongst the community to which the parties interested belong*."

The same principle enunciated by Mr. Justice West in this case found expression in the much earlier case of *Kojahs and Memons*[3], and this principle ought, I think, always to be kept in mind by the Courts in India, dealing with trusts and settlements created by those communities in India, who are not covered by the exception created by statute in favour of Mahomedans and Gentoos, and to whom English law is promiscuously applied.

Before finally leaving *Limbuwalla's* case[4] I ought to notice another passage in the judgment, where Mr. Justice Jardine says :—

"The other object, viz., the acquiring by a few private persons of benefits through the protection of the Furohurs seems to me to resemble a gift to a private company and therefore not a gift to a charitable use."

The learned Judge relies on the cases of *Cocks* v. *Manners*[5], and the *Attorney-General* v. *Haberdashers' Company*[6] as authorities for the above passage. In the first of these cases the Court had to deal with gifts to two chapels, a convent and a

(1) (1875) L. R. 6 P. C. 381.
(2) (1881) 6 Bom. 40.
(3) (1847) P. C. C. 110.
(4) (1887) 11 Bom. 441.
(5) (1871) L. R. 12 Eq. 574.
(6) (1834) 1 My. & K. 420.

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society of sisters of charity, and in the second case the gift was to a company in London "for increase of their stock of corn" It is very difficult to find where the resemblance of trusts for Muktad ceremonies with gifts to private companies comes in, but it seems to me that the whole difficulty has arisen from the fact that the learned Judge was led into forming erroneous views as to the real nature and objects of the trusts he had before him.

In the course of the trial much has been said before me about Masses in Ireland and gifts for saying Masses for the repose of the souls of the dead, and it appears to me to be very useful here to consider how the Courts have treated those gifts. The gradual but radical change that has come over the Courts when considering the questions relating to gifts for the celebration of Masses is most remarkable. The law relating to religious trusts prevailing in Ireland ought really to be the law applicable to religious trusts in India. In Ireland, as in India, there is no established Church, and all religious creeds are alike in the eye of the law. It is, therefore, to the Irish cases that we must look for help and they have a far greater applicability to religious trusts in India than some of the English cases relating to the same subject. It is not necessary to refer to cases earlier than *Attorney-General* v. *Delaney*[1]. This and the two subsequent cases I propose to refer to give fairly elaborate and exhaustive summaries of the statute and case law relating to religious trusts in both England and in Ireland.

In the course of an elaborate judgment delivered by him in *Attorney-General* v. *Delaney*[1], Chief Baron Palles held that trusts for the celebration of Masses in private were invalid, as not being charitable, but expressed a very strong opinion that if the trust had been for the celebration of Masses in public, the trust would have been a good and valid charitable trust in the eye of the law. His colleagues on the Bench—Barons Fitzgerald, Dowse and Deasy—were not prepared to go to the length the Chief Baron had gone, and guarded themselves by declaring that they must not be taken as holding that the opinion expressed

(1) (1875) I. R. 10 C. L. 104.

by the Chief Baron was the judgment of the Court. The Court in this case contented itself by saying that they left the question as to whether a trust for Masses directed to be celebrated in public would or would not be a valid charitable trust; open, to be decided whenever it may arise. Twenty-two years afterwards it did arise in the case of the *Attorney-General* v. *Hall*[1] wherein a Bench consisting of Lord Ashbourne, the Lord Chancellor of Ireland, and Lords Justices FitzGibbon, Barry and Walker, held that "a bequest to a Roman Catholic priest, to be applied for Masses to be celebrated publicly in a specified Roman Catholic Church in Ireland for the repose of the testator's soul, is a valid charitable bequest."

Thus, what the Chief Baron Palles had expressed as his opinion was pronounced to be a judicial finding nearly a quarter of a century afterwards.

But by far the most remarkable advance in the law was made in the great case of *O'Hanlon* v. *Logue*[2]. By a curious coincidence it happens that Chief Baron Palles was a member of the Bench which decided this case—the other Members being Lord Chancellor Walker and Lords Justices FitzGibbon and Holmes. In the whole discussion before me, and amongst the numerous authorities cited before me, I consider that this case is by far the most important and has the closest bearing on the question I am now considering. The testatrix in this case devised and bequeathed all her property to trustees upon certain trusts, the ultimate trust being "to sell and invest the proceeds and to pay the income thereof from time to time to the Roman Catholic Primate of all Ireland for the time being, to be applied for the celebration of Masses for the repose of the souls of my late husband, my children and myself." The Court, after a most elaborate and exhaustive argument, overruled *Attorney-General* v. *Delaney*[3], thirty-one years after its decision, and held:—

"That a bequest for Masses in perpetuity is a good charitable gift, whether there is a direction that the Masses should be celebrated in public or not."

(1) [1897] 2 I. R. 426. (2) [1906] 1 I. R. 247.
(3) (1875) I. R. 10 C. L. 104.

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What are Masses is fully explained in *Attorney-General* v. *Delaney*[1], and some extracts from the prayers recited during the celebration of the Masses are given in that case. Though commonly these prayers are supposed to be recited for the repose of the souls of the dead, a perusal of them will show that, very much like the prayer said by the Parsi priests during the Muktad ceremonies, they are prayers involving a sacrifice to God, invoking blessing on mankind, and including worship of the Creator. They are prayers offered to God to propitiate His anger, to return thanks for His benefits and to bring down His blessings upon the whole world. The celebration of the Masses is, like the celebration of the Muktad ceremonies, an Act of Divine Worship, and the performance of Masses helps to maintain the priestly class, the moneys paid to them for Masses forming a portion of their ordinary income and means of livelihood.

No apology is necessary for transcribing here certain passages from the judgments delivered in this case; first, because those passages have the closest and the most important bearing on the present case; and secondly, because they contain sentiments and thoughts the most ennobling that humanity could utter. The Lord Chancellor, in the course of his judgment, says (at p. 259) :—

> "There are some legal propositions germane to the case for which it would be mere pedantry to cite authority:—(*a*) That in speaking of what is 'charitable' we use the word in the artificial sense, which is derived from the statute 43 Eliz. c. 4; (*b*) that included amongst charitable objects is one which, according to the ideas of the giver, is for the public benefit; (*c*) that a gift for the advancement of 'religion' is a charitable gift: and that in applying this principle, the Court does not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it be not contrary to morals, or contain nothing contrary to law. All religions are equal in the eye of the Law. . . . Whether the subject of the gift be religious or for an educational purpose, the Court does not set up its own opinion. It is enough that it is not illegal, or contrary to public policy, or opposed to the settled principles of morality."

(1) (1875) I. R. 10 C. L. 104.

Chief Baron Palles, in the course of his judgment, after reviewing all the English and Irish authorities, goes on to say (at p. 270) :—

"The acts of worship of a Church are admitted, by all theistic religions, to tend to discharge, to some extent, the debt due to God by the general body of the faithful, and to bring down upon them temporal and spiritual benefits. But these acts must be performed by ministers of that Church ; and thus the gifts are in a two-fold manner charitable—first, and principally, by reason of the piety which is the essence of the gift to God, the gift which is to be applied to His Divine Worship ; and secondly, by the mode in which it is to be so applied, *viz.*, in the maintenance and support of the ministers by whom the acts of worship are to be performed."

That there is a most striking resemblance between the ceremonies performed and prayers recited during the Muktad days and the performance of Masses will appear from the following passage in the Chief Baron's judgment (at p. 274) :—

The Service of Mass "is an act of divine worship of the Church, an offering of praise, adoration, and thanksgiving, involving a petition for benefits temporal and spiritual, for all the faithful alive, whether present or absent."

This is exactly what the witnesses have said with regard to the Muktad ceremonies, with perhaps this addition, that the prayers recited by the Zoroastrian priests are more altruistic, and the petition for benefits is not confined to the faithful but is universal.

The Chief Baron goes on to say (at p. 275) :—

"The existence of a divine service is essential to all religions ; and equally essential is the existence of a privileged class, a priesthood or a class of ministers, by whom that divine service shall be celebrated, on behalf of the Church. The divine service of the particular religion must be defined by the doctrines of its own religion. Without those doctrines it cannot exist as a divine service. Without a knowledge of those doctrines, the spiritual effect of the service cannot be understood. Consequently, the effect of the divine service cannot be known, otherwise than from the doctrines of its religion, coupled with a hypothetical admission of their truth. But *the advancement of any theistic religion is charitable, and such advancement may result from an increased number of the celebrations of its divine service.* Therefore the charitable nature of a divine service must when the religion is not an established one) depend upon the character of the act, not objectively, but according to the doctrines of the religion in question.

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In the course of the argument before me it has been strenuously contended that the performance of the Muktad ceremonies results in no public benefit; that it merely has a tendency to put money in the pockets of the priest, and that the recitation of the prayers and the compliance with all the solemn rituals accompanying the performance of the ceremonies have no real efficacy and do not result in any benefit of a public nature. This identical question is dealt with by the Chief Baron, and the contention is refuted in the most effectual manner. He says (at p. 276):—

"But when it (the Law) knows those doctrines, although it knows that, according to them, such an act has the spiritual efficacy alleged, it cannot know it *objectively* and as a fact, unless it also knows that the doctrines in question are true. But it never can know that they are objectively true, unless it first determines that the religion in question is a true religion. This it cannot do. It not only has no means of doing so, but it is contrary to the principle that all religions are now equal in the law. It follows that there must be one of two results: either—(1) the Law must cease to admit that *any* divine worship can have spiritual efficacy to produce a public benefit; or, (2) it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrines of the religion whose act of worship it is.

"The first alternative is an *impossible* one. The law, by rendering all religions equal in its sight, did not intend to deny that which is the basis of, at least, all Christian religions, that acts of divine worship have a spiritual efficacy. To do so would, virtually, be to refuse to recognise the essence of all religion.

"The other result must, therefore, necessarily ensue. It must ascertain the spiritual efficacy according to the doctrines of the religion in question; and if, according to those doctrines, that divine service does result in public benefit, either temporal or spiritual, the act must, in law, be deemed charitable."

Now, in this case it is proved beyond doubt that according to the doctrines of the Zoroastrian religion the performance of the Muktad ceremonies is enjoined—that it is the duty of all Zoroastrians to have these ceremonies performed. The Court has before it the knowledge what ceremonies are obligatory and what are optional—the Court has before it the prayers ordained to be recited during the ceremonies—the Court has before it the evidence of witnesses proving that these ceremonies have to be performed by priests who are paid for doing so and such honoraria as they receive form a portion of their income, and are their

ordinary means of livelihood. The Court is then in a position to judge how far the witnesses are right, when they say the performance of such religious ceremonies amounts to an Act of Divine worship which is believed by the community to bring down to the world both temporal and spiritual benefits—not only on those that perform the ceremony—but on the whole community—on their country and their Sovereign—on all mankind—on the Universe. If this is the belief of the community—and it is proved undoubtedly to be the belief of the Zoroastrian community—a secular judge is bound to accept that belief—it is not for him to sit in judgment on that belief—he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be in advancement of his religion and for the welfare of his community or of mankind, and say to him, "You shall not do it." This Court can only judge of the efficacy of such gifts in procuring public benefits by the belief of the donor and of the community to which he belongs—the belief of those who profess the religion—the ordained ceremonies of which the donor desires performance.

Lord Justice FitzGibbon, speaking on the point, says (at p. 279) :—

"In determining whether the performance of any particular rite promotes any particular religion, and benefits the members of the Church or denomination, or body, who profess it, the secular Court must act upon evidence of the belief of the members of the community concerned. It *can* have *no* other guide upon that subject.

"The exclusiveness, the vagueness, or the self-sufficiency of principles religiously held by particular creeds, whether they rest on dogma, or on conscience, cannot exclude those who profess any lawful creed from the benefits of charitable gifts.

"It would be strange, indeed, if bequests for the promotion of total abstinence, or even vegetarianism; for the maintenance of a place of worship, or of a minister, for a small congregation of peculiar people; for the dissemination of the works of Joanna Southcote; or for the prevention of cruelty to animals, should be held, as they have been, to be charitable objects, if a provision by a Roman Catholic, for Roman Catholics, for the celebration of the Mass, more especially in Ireland, where 'Superstitious Uses' are not *mala prohibita*, were to be excluded from that category."

To this I would add that it would be stranger still in a country like India, where superstition abounds, where each community is

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by the Crown left free to profess what religion it pleases—from where the doctrine of superstitious uses is rigorously excluded, where trusts of lands and moneys in perpetuity for idols and similar trusts are recognised and enforced by the Courts—that a Parsi professing the Zoroastrian religion should be precluded from making a gift for the performance of religious rites and ceremonies which he is enjoined by the religion he professes to perform, and the non-performance of which, according to his religion, is a great sin. Why should he be precluded from setting apart a portion of his property and devoting it to a purpose which he believes would result in benefits to himself, his family and his community—in promoting the religion he professes and saving his descendants from committing a sin should circumstances place them in a position of inability to perform these ceremonies for want of means. On this point in the same case Lord Justice FitzGibbon, a Protestant Judge, observes (at p. 280) :—

"Speaking with all reverence of a faith which I do not hold, touching the very 'Mystery of Godliness', I could not impute to any individual professing the Roman Catholic religion that he regarded a gift of money for Masses as a means of securing from such a Sacrifice a private and exclusive benefit for himself alone, as being much less than blasphemy; and, as I understand the proved doctrine of the Church, it would certainly be heresy. But the hope or belief that, in some shape or form, here or hereafter, a man's good works will follow him—an ingredient of selfishness in that sense—enters into almost every act of charity; and if the act is done in the belief that it will benefit others; for example, in the belief that he that gives to the poor lends to the Lord, it can be none the less charitable because the giver looks for his reward in heaven."

Lord Justice FitzGibbon ends his judgment by saying:—

"The fruition of faith, 'the evidence of things not seen', is hidden from humanity. It is not within the power of any earthly tribunal to entertain the question whether these propositions are true. But it is for us to decide that belief in their truth is part of the faith of the members of the Church which has laid them down."

Speaking of the belief of the Roman Catholics in the efficacy of the performance of Masses being benefits to the community, Lord Justice Holmes says (at p. 286) :—

"A temporal Court in Ireland, having no authority to decide for itself whether it was true or not, must take as its guide the belief of the Church of which the testatrix is a member."

I would like here to say that so far as I am concerned, I have scarcely ever come across a case in a Court in another country bearing closer resemblance to facts and contentions of a case before our Courts than the case of *O'Hanlon* v. *Logue*[1] bears to the present case. It must be remembered that it is decided by the tribunal having the highest jurisdiction in a country in which religious matters bear remarkable analogy to this country—Ireland like India having no established Church, no State religion, and where the doctrine of superstitious uses has no application. It is decided as recently as 1906, its pronouncements are clear and emphatic; there is no element of doubt or a note of uncertainty in the judgments pronounced; every case of importance on the subject, ancient or modern, is carefully considered and the question before the Court finally and definitely settled. Judgments such as those pronounced in this case must command the respectful attention of other Courts deciding similar questions. This case alone is sufficient to set at rest all doubts and remove all difficulties in the decision of this case, and enables me to answer the question before me—

> "Whether the Trust declared in respect of the Government Promissory Notes for 15,000 Rupees mentioned in the plaint are valid."

in the affirmative with considerable confidence. I hold that Trusts and bequests of lands or money—for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktad, Baj, Yejushni and other like ceremonies, are valid "charitable" bequests, and as such exempt from the application of the Rule of Law forbidding perpetuities.

The only other question to be considered is as to costs. The plaintiff is a member of the Bar, and as such he has conducted his own case. At the end of the case he intimated to me that he does not propose to saddle the trust funds with his own fees. This is generous of him. I ought here to say that throughout the whole case the attitude of the plaintiff was most correct. He did not come to the Court for the purpose of dividing the Trust estate. His share in the funds would have been so small that it would not have been worth his while troubling about it if his

(1) [1906] 1 I. R. 247.

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motive had been merely to share in the division of the funds. On the very first day the matter came on before me, he expressed his perfect willingness to have the matter decided against him, which, of course I had no power to do in the face of the decision in 11 Bombay and in the absence of any materials before me. He came to Court for directions as the original Trustees had all died, the ceremonies had remained unperformed in the previous year, and the income of the funds remained unutilized. His single-handed but vigorous fight has saved the case from being stigmatised as a one-sided show or a happy-family arrangement. He is entitled to his costs; whether he takes them or not it is for him to decide. Had the other parties, excluding from this expression, of course, the Advocate-General—followed the plaintiff's example as I had hoped they would and offered to bear their own costs, the plaintiff's unselfish offer would have been most useful. When I gave expression to my inclination to give priority to the Advocate-General for his costs a most acrimonious discussion ensued. Mr. Bahadurji vigorously resented the suggestion, and argued—I now find correctly—that there is no precedent for such an order and that it would be a most unusual order to make. Mr. Kanga claimed priority for the costs of his clients and argued that his clients were Trustees, and as such were entitled to have their costs paid out of the funds taxed as between attorney and client. He claimed a lien on the funds for his costs. Mr. Kanga's clients are not Trustees. They are merely the executor and executrix of the will of one of the original Trustee and are in exactly the same position as the plaintiff who is Administrator of the estate of another original Trustee, and the tenth and eleventh defendants, who are executors of the will of the third original Trustee. That his clients are in possession of the Trust property is merely an incident due to the fact that their Testator was the last of the Trustees to die. This circumstance does not alter their position or give them any preferential rights over others as to costs. Mr. Raikes, the Acting Advocate-General whom I directed to be added as a party, has made a successful fight for the Trust and earned the gratitude of all those interested in upholding the Trust, and I would be extremely sorry if his

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costs are not fully recovered from the Trust Funds. I regret I can find no precedent enabling me to give him priority as to his costs. The only order under the circumstances, I can make, is that the costs of all parties appearing before me be paid out of the Trust property—those of the Advocate-General being taxed between attorney and client. Costs to be taxed as if this Originating Summons had been a long cause.

I cannot conclude this judgment without expressing my sense of obligation to the members of the legal profession engaged in this case, most especially to Mr. Bahadurji, for the very valuable assistance they have rendered to the Court throughout the case.

Attorneys for the plaintiff:—*Messrs. Wadia, Gandhy & Co.*

Attorneys for defendant No. 1:—*Messrs. Pestonji, Rustim & Kola.*

Attorney for defendants Nos. 10 and 11:—*Mr. P. S. Batlivala.*

Attorneys for defendant No. 12:—*Messrs. Jehangir, Gulabbhai and Billimoria.*

B. N. L.

Note:—Italicised words or sentences, occurring in quotations from treatises or documents and embodied in this judgment, indicate that Mr. Justice Davar desired to emphasise those particular words or sentences and do not indicate that they were so italicised in the originals from which the quotations are taken.—EDITOR.

CRIMINAL REVISION.

Before Chief Justice Scott and Mr. Justice Heaton.

EMPEROR *v.* BABULAL KANAIYALAL.*

1908.
July 17.

Penal Code (Act XLV of 1860), secs. 21, 186—Public Servant—Obstruction to a public servant—Clerk in the cess-collection department of a District Municipality—Bombay District Municipal Act (Bombay Act III of 1901).

A clerk in the cess-collection department of a District Municipality constituted under the Bombay District Municipal Act (Bombay Act III of

* Criminal Application for Revision No. 86 of 1908.

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1901), is a public servant within the meaning of section 21, clause 10 of the Indian Penal Code (Act XLV of 1860); and any obstruction offered to him in execution of his duties is an offence punishable under section 186 of the Code.

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898) against the conviction and sentence recorded by the Honorary First Class Magistrate of Ahmedabad.

The complainant was a clerk in the cess-collection department of the Ahmedabad City Municipality.

The Municipality served a bill for privy tax (Rs. 2-1-0) upon the accused, in respect of his house. The amount not having been paid, a notice of demand was served upon the accused. The Municipality subsequently obtained a warrant of attachment, which they attempted to serve through their clerk, the complainant. When the complainant went to the accused's house to execute this warrant he was obstructed by the accused, who was thereupon tried for and convicted of an offence punishable under section 186 of the Indian Penal Code (Act XLV of 1860). The accused was sentenced to pay a fine of Rs. 25.

The accused applied to the High Court.

L. A. Shah, for the accused :—

The complainant is not a public servant within the meaning of section 21 of the Indian Penal Code. The act of the accused therefore does not amount to an offence under section 186 of the Code.

There was in the old Municipal Act (Bombay Act II of 1884, section 46) a provision making all Municipal servants public servants within the meaning of section 21 of the Indian Penal Code. The present Municipal Act (Bombay Act III of 1901, section 45) however makes only particular servants public servants for certain limited purposes.

The case of *Reg* v. *Nantamram Uttamram* [1], which is against my contention, was decided under the old Municipal Act of 1850, where there was no provision corresponding to section 45 of the

(1) (1869) 6 Bom. H. C. R. Cr. Ca. 64.

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present District Municipal Act. Referred to *Emperor* v. *Gulab* (1) and *Emperor* v. *Ezekiel* (2).

M. N. Mehta, for the complainant, was not called upon.

SCOTT, C. J.:—The accused and his wife were living together in a house in Ahmedabad and were liable for Rs. 2-1-0, in respect of privy tax for the house they were living in under section 82 of Act III of 1901. A bill for the sum claimed for the tax was presented to the accused although the bill itself was made out in the name of his wife. The bill not having been paid notice of demand in the statutory form prescribed in Schedule B was served upon the accused and on his failure to pay a warrant was served upon him by the complainant Lakshmi-shankar Maganlal who was a clerk in the cess-collection department of the Ahmedabad Municipality. When the warrant of attachment was taken to the accused for execution according to law the accused obstructed the complainant in the execution of the warrant. For this he has been charged under section 186 of the Indian Penal Code and there is no doubt that he is guilty if the complainant was a public servant executing his duty within the meaning of that section of the Indian Penal Code.

Public servants are defined by the Penal Code, section 21: clause (10) of that section includes in the term "public servant" every officer whose duty it is as such officer to receive any property for the secular purpose of any táluka or district.

We are of opinion that the complainant being clerk in the cess-collection department of the Municipality falls within the words of clause (10), which we have read, and we are supported in that conclusion by the judgment of this Court delivered in the case of *Reg* v. *Nantamram Uttamram* (3).

We, therefore, think that the conviction was right and we dismiss the application.

R. R.

(1) (1904) 1 All. L. J. 125. (2) (1904) 6 Bom. L. R. 54.

(3) (1869) 6 Bom. H. C. R. Cr. Ca. 64.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1908.
March 3.

SIR JEHANGIR COWASJI JEHANGIR, APPELLANT AND PLAINTIFF, *v.* THE HOPE MILLS, LIMITED, AND OTHERS*, RESPONDENTS AND DEFENDANTS.

Practice—Decree—No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree—Appeal against such an order.

A decree of the High Court on the Original Side contemplated an account being taken between the parties but it was silent on the question as to how that account was to be taken, whether by the Commissioner or by some person selected by both the parties. The Court of first instance decided that where a direction as to account ought to have been incorporated in a decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken.

Held, on appeal, that as some account was taken under the decree by a person appointed jointly by the parties, a new agreement had come into existence superseding the decree, and the Court was not competent to make the order appealed against.

An appeal lies against an order of a Judge sitting on the Original Side if that order decides a question of some right between the parties.

APPEAL from an order of Davar, J.

The plaintiff, Sir Jehangir Cowasji Jehangir, as mortgagee in possession of the property of the first defendant company, The Hope Mills, Limited, instituted this suit in August 1903 to recover the moneys due to him under his mortgage and prayed that in default of payment the right to redeem may be foreclosed or the mortgaged premises might be sold. The mortgage was dated the 5th April 1900. After the date of the mortgage the plaintiff on the 30th of May 1901 had entered into an agreement with the first defendant company under the terms of which he worked the Mills of the company.

On the 26th of January the plaintiff obtained a decree which was defective in some respect. On the 9th August 1904, an application for final decree for foreclosure or sale was refused

*Suit No. 490 of 1903; Appeal No. 3 of 1908.

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on the ground that the exact amount due to the plaintiff as first mortgagee was not determined.

On the 19th of October 1907 one Jivanlal Choonilal Chinoy, claiming to be the senior partner in the firm of Rangildas Bhookandas and Co., agents of the first defendant company, obtained on behalf of the company, a rule *nisi* calling upon the plaintiff to show cause "why he should not pass his accounts as first mortgagee in possession of the moveable and immoveable property of the said first defendant company before the Commissioner for taking accounts."

The rule was argued before Davar, J., on the 21st November 1907, who made the rule absolute by ordering the plaintiff to pass his accounts before the Commissioner.

Against this order the plaintiff appealed.

Scott, Advocate General, and *Robertson* for the appellant. In the course of this argument they referred to the following cases:—*Ajudhia Pershad* v. *Baldeo Singh*[1], *Nandram* v. *Babaji*[2], *Tiluck Singh* v. *Parsotein Proshad*[3], *Tara Prosad Roy* v. *Bhobodeb Roy*[4], *Akikunnissa Bibee* v. *Roop Lal Das*[5], *Tara Pado Ghose* v. *Kamini Dassi*[6].

Setalvad (with *Raikes*) for the respondent.

CHANDAVARKAR, J.—We are of opinion that the order appealed from ought to be set aside.

A preliminary point has been raised by the learned counsel for the respondent that no appeal lies from that order upon the ground that it was made under either section 206 of the Civil Procedure Code or Rule 305 of this Court's Rules.

In order to bring the order under section 206 of the Code it is necessary that the application was made to bring the decree into conformity with the terms of the judgment or to correct or rectify a clerical or arithmetical error found in the decree. Now, it is not pretended by the counsel for the respondent that the decree or order was defective on the ground of a clerical or

(1) (1894) 21 Cal. 818 at p. 823.
(2) (1897) 22 Bom. 771.
(3) (1895) 22 Cal. 924.
(4) (1895) 22 Cal. 931.
(5) (1897) 25 Cal. 133.
(6) (1901) 29 Cal. 644.

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arithmetical error; nor has it been argued that there was any inaccuracy to bring the decree within the terms of Rule 305. What has happened is that while the decree contemplated an account being taken between the parties, it was silent on the question as to how that account was to be taken, whether by the Commissioner or by some person selected by both the parties. It is argued that the omission was due to pure inadvertance, but we do not think we can presume anything of the kind, because, as the learned Advocate General has said, the decree *nisi* was settled by the solicitors of the parties and they could not have failed to note what the terms they settled would mean.

Under these circumstances we must presume that the omission was intentional. The decree left it open to the parties to have the account taken and settled privately by some person of their nomination.

We do not think that the application made before the learned Judge in the Court below can be treated as one for the mere amendment of the decree under either section 206 of the Code or Rule 305.

It must be remembered that the defence set up by the appellant in the Court below was that after the decree, new rights had come into existence; that the decree having contemplated an account being taken, it had been taken by a person appointed jointly by the parties with the result that a certain sum was found due by the respondent company to the appellant. This is not disputed. In this state of facts the rights of the parties would fall within the law enunciated in the case of *McKellar* v. *Wallace*[1]. There the Right Hon. T. Pemberton Leigh in delivering the Judgment says:—"The law in cases of this kind I apprehend to be perfectly clear. Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other, should be furnished in the settlement of those

(1) (1853) 5 Moo. I. A. 372 at p. 395.

accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled, therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud; in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or, from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side".

Therefore, if there is no fraud, it is a settled account and gives rise to new rights between the parties to the decree. Under these circumstances, what the learned Judge was deciding was the question of a right; by his order he has varied the decree which he had no jurisdiction to do in a proceeding such as this initiated by a rule *nisi*. We must, therefore, hold that an appeal lies.

Another cogent ground is that the order now under appeal requires the plaintiff to file a suit. That certainly affects the plaintiff's rights. The plaintiff is entitled to say that he is not bound to file a suit. If the respondent questions the agreement between the appellant and the company there is no reason why the respondent should not, if he chooses, file a suit to have that agreement cancelled: why should the appellant be compelled to file a suit? We think that again leads us to hold that an appeal lies.

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Having held that an appeal lies, we now come to the merits, and the observations, which I have made, dispose of that point also. We think there was no question of any amendment, and if new rights have come into operation between the parties, the Court was not called upon to modify the decree or to direct the plaintiff to file a suit and have the rights between the parties adjudicated upon. The plaintiff says there has been an account taken under the decree between him and the defendants and that as a result of the account a new agreement has come into existence between the parties. That is not disputed. His defence is in fact that the decree is superseded by the agreement. If it is so, it would be open to the defendants to have that agreement cancelled.

Under these circumstances, we must reverse the order appealed against with costs.

We do not express any opinion upon the question whether the agreement set up by the plaintiff falls within section 257A of the Code of Civil Procedure. That is not a question which was before the learned Judge or which can arise in this proceeding. The question now merely is whether the decree should be amended or not, and therefore, no question under section 257A can arise, nor can any question as to the invalidity of it upon any other ground be gone into.

We set aside the order and discharge the rule with costs.

The appellant is entitled to add the costs to his mortgage debt.

Attorneys for the appellant :—*Messrs. Mulla & Mulla.*

Attorneys for the respondents :—*Messrs. Bhaishankar, Kanga & Girdharlal*; *Messrs. Malvi, Hiralal, Modi & Runchhoddas*; and *Messrs. Daphtary, Farrera & Divan.*

B. N. L.

ORIGINAL CRIMINAL.

Before Chief Justice Scott and Mr. Justice Batchelor.

IN RE BAL GANGADHAR TILAK. 1908. *September* 8.

Criminal Procedure Code (Act V of 1898), sections 233, 234, 235, 236, 237 and 239—Charges, joinder of charges—Privy Council, leave to appeal to, in criminal case—Practice and Procedure.

The accused was charged with an offence punishable under section 124A of the Indian Penal Code (Act XLV of 1860) in respect of an article which he published in his newspaper and also with offences punishable under sections 124A and 153A of the Code with regard to another article which he published in the same newspaper. For all these offences he was tried at one trial, and was convicted and sentenced for each of them.

Held, that there was no irregularity in the trial on the ground of misjoinder of charges.

Sections 234, 235, 236 and 239 of the Criminal Procedure Code, 1898, mentioned as exceptions in section 233 of the Code, are not mutually exclusive. If it had been intended that section 235 (*2*) or section 236 could not be made use of in co-operation with section 234, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of section 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

The Legislature could hardly have intended that a joint trial of three offences under section 234 of the Criminal Procedure Code, 1898, should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of.

Sections 235 (*2*) and 236 of the Criminal Procedure Code, 1898, may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

Before granting a certificate for leave to appeal to the Privy Council, the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

Ex parte Carew[1] and *Dinizulu* v. *Attorney-General of Zululand*[2], followed.

THE accused was the editor, printer and publisher of a weekly newspaper called the "Kesari", which was published at Poona.

(1) [1897] A. C. 719. (2) (1889) 61 L. T. 740.

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The newspaper, in its issue dated the 12th May 1908, contained an article entitled "The Country's Misfortune", and there appeared another article under the heading of "These remedies are not lasting" in its issue dated the 9th June 1908.

The accused was charged before the Chief Presidency Magistrate of Bombay, by complaints filed separately in respect of each article. Each complaint alleged that the accused committed offences punishable under sections 124A and 153A of the Indian Penal Code, 1860, in respect of each of the two articles. Two inquiries were made; and the Magistrate committed the case to the High Court under two committing orders, each of which was based on charges under sections 124A and 153A in reference to each of the two articles.

When the trial in the High Court began, the Advocate-General applied for one trial on all the charges.

Branson (officiating Advocate-General) for the Crown:—Section 234 of the Criminal Procedure Code, 1898, applies to this case. The offences charged are exactly the same: they are committed within three weeks of each other; and, therefore, they should be tried together at one trial. As a matter of fact, there are separate charges with respect to each of the offences. The prosecution desires one trial for all the charges. We are within the wording of section 235 of the Code: see *Emperor* v. *Fattu*[1].

The incriminating articles, as well as the articles which are put in to show the intention of the accused, begin from the 12th May 1908. The newspaper in question has published a series of articles which form the subject-matter of the charges, namely, the articles of the 12th May and the 9th June, and a series of intervening articles upon which we rely as showing that they were all written as part and parcel of one transaction intended for the purpose of producing disaffection and disloyalty against the Government established by law in British India.

The accused in person:—I contend that section 227 of the Criminal Procedure Code, 1898, is the section that applies to this case. The Magistrate has framed the charges under sections 233,

(1) (1903) 26 All. 195.

234 and 235. Section 234 applies to the charge when the charge is first framed by the Magistrate and there is no provision in the Criminal Procedure Code by which the different charges can be amalgamated as it is proposed at present. Secondly, though the articles are in the course of the same transaction, yet they form different subjects altogether; and it would be more convenient for me to have each of them tried separately. The two articles refer to different subjects, and if the trial is jointly carried on, it will introduce a sort of confusion in my mind. Sections 234 and 235 are permissive, but section 233 is imperative. There are separate articles dealing with separate aspects of the question. They do not form part of one transaction.

Branson in reply:—This is not a question of the amendment of charges at all. Even if it be so treated, the Court has great powers under section 226. As a matter of fact the two charges remain unaltered and I propose to try them both together.

I am entitled to put the charges before the Court, and in reference to the possible difficulty of there being four charges I submit that section 235 would dissipate that difficulty altogether. The charges under sections 124A and 153A will be treated as being alternative charges or charges framed in order to meet possibly of one or the other set of facts, in which case either offence might or might not be proved. In that case there would be four charges. In order to avoid the possibility of there being any difficulty or doubt, I propose to proceed under section 333 and say that for the present at all events I will not proceed under section 153A on the first article and that will result in a stay of proceedings and discharge of the accused but not an acquittal.

DAVAR, J.:—In this case two separate informations were laid before the Magistrate, and the Magistrate held two separate enquiries and made two separate commitments. The question now before me is whether these two cases can be taken together and tried at one trial. It would be extremely desirable from my point of view and also, I think, in the interest of the accused himself that there should be one trial if possible and the whole

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question should be before one Jury who tries him. The accused, under section 233 of the Criminal Procedure Code, is entitled to be tried separately unless the provisions of sections 234, 235, 236 and 239 come into operation. I have grave doubts about section 235 applying to this application. It seems to me that there would be some difficulty in holding that separate newspaper articles written week after week would come under the "same transaction"; but I have no difficulty whatever in ordering the same trial under section 234, provided that the charges do not exceed three. In this instance the charges are four, but the Advocate-General offers to make use of section 333 to stay proceedings with reference to one of the four charges. I am quite willing to allow him to make use of that section and to allow him to withdraw any one of the four charges he chooses to withdraw. But I do not wish the Advocate-General to be taken by surprise. I think it would be fair to the accused if the Crown is not prepared to go on with any particular charge or for convenience wishes, or feels inclined, not to proceed with one of the charges that I should under the powers given to me under the same section order that the discharge of the accused should amount to an acquittal. It is not right that the accused should have that charge hanging over him indefinitely. I will order three charges in the two cases to be tried at one trial provided that there are three charges only and the fourth one is abandoned and not kept hanging on the accused's head. That would be for the Advocate-General to decide.

The prosecution accordingly selected three charges, *viz.*, those under section 124A and section 153A with respect to the article dated the 12th May 1908 and the one under section 124A as to the article published on the 9th June 1908.

The trial proceeded with a Jury, on the three charges. The Jury returned their verdict of guilty on all the three charges. The sentence passed was three years' transportation on the first charge under section 124A of the Indian Penal Code, three years' transportation on the second charge under section 124A, the two sentences to run consecutively: and a fine of Rs. 1,000 on the charge under section 153A.

After the sentence was passed the Advocate-General intimated to the Court that he would not proceed on the charge under section 153A, which was held over, and the learned Judge thereupon discharged the accused on that charge directing that the discharge should amount to an acquittal.

The accused, thereupon, applied for leave to appeal to the Privy Council. Among the grounds on which the leave was sought, were the following :—

32 (*h*) That the learned Judge acted illegally in trying your petitioner at one and the same trial for at least three offences, not of the same kind and not committed in the same transaction, contrary to the express provisions of section 233 of the Criminal Procedure Code and in opposition to your petitioner's objection, thereby vitiating the whole trial and rendering it illegal, null and void *ab initio*.

32 (*s*) That the learned Judge acted illegally in passing two sentences, one under section 124A, Indian Penal Code, and the other under section 153A, Indian Penal Code, if it be held by the Court that the transaction is one and the same, but your petitioner submits that the transaction is not the same as ruled by the learned Judge.

32 (*t*) That the learned Judge acted illegally in passing two sentences, one under section 124A and the other under section 153A upon one article and the one and the same act.

The Court in granting a Rule passed the following order :—

As we stated yesterday we issue a Rule calling upon the Crown to show cause why the Court should not grant a certificate that this is a fit case for an appeal to the Privy Council on points 32 (*h*) and 32 (*s*) and (*t*) in the petition of the accused.

We have taken time to consider whether we should issue a Rule upon any other point and we have come to the conclusion that there is no substance in any of the other points that have been taken.

We think it right, however, to mention with regard to point 32 (*r*) as to the addition of a fresh charge at the close of the case with reference to the previous conviction that it appears to us upon the *ex parte* argument which we have heard that a procedure was adopted which is not contemplated by the Criminal Procedure Code. It was evidently adopted in order to bring to the mind of the Judge in passing sentence the fact that the

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prisoner had been previously convicted. But that fact was obviously already present to his mind, for he had cited copiously from the summing up of Mr. Justice Strachey in the previous Tilak Trial in 1897, and he had before him and present to his mind the affidavits that had been made on the bail application which mentioned the previous conviction and the undertaking which had been given by the prisoner upon his release. We, therefore, think there is no substance whatever in the objection that has been taken, and it would not be right to needlessly occupy the time of the Court by granting a Rule upon the point thus inviting further argument.

We make the Rule returnable on Wednesday next.

Baptista, in support of the rule:—

Section 233, Criminal Procedure Code, lays down the fundamental rule, any contravention of which constitutes an illegality incurable by section 537 upon the Privy Council decision in *Subrahmania Ayyar* v. *King-Emperor*(1). This case was followed in several cases in Bombay: see *King-Emperor* v. *Krishnarao*(2); *Emperor* v. *Nathalal*(3); *Emperor* v. *Lallubhai*(4); *Emperor* v. *Wassanji Dayal*(5); and *Emperor* v. *Jethalal*(6). The number of offences may be large or small. That makes no difference. If the rule is infringed the trial is illegal. In *Emperor* v. *Wassanji Dayal*(5) only two offences under sections 380 and 414, Indian Penal Code, were charged. In *Nawab Khajah Solemollah Bahadur* v. *Ishan Chandra Das*(7) the Court even held the trial was illegal for omitting to give the notice prescribed in section 145, clause (3), of the Criminal Procedure Code.

Section 234 does not apply, because the offences are not of the same kind as they do not come within the same section, and the amount of punishment is not the same.

Section 235 does not apply, for this section with all its clauses is confined to offences committed in the same transaction only: see *Sher Shah* v. *Empress*(8); *Gopaluni Narasaiya*(9). If it were

(1) (1901) 25 Mad. 61.
(2) (1902) 4 Bom. L. R. 53.
(3) (1902) 4 Bom. L. R. 433.
(4) (1902) 4 Bom. L. R. 440.
(5) (1904) 6 Bom. L. R. 725.
(6) (1905) 29 Bom. 449; 7 Bom. L. R. 527.
(7) (1905) 9 C. W. N. 909.
(8) (1887) P. R. No. 43 of 1887 (Cri.)
(9) (1883) Weir 892.

not confined to the same transaction, these trials can never be illegal and the Privy Council ruling in *Subrahmania's case* would be wrong. In this case the two articles do not form part of the same transaction.

Section 236 is also confined to the same transaction. Moreover, it does not apply to the present case because this is no case of doubt.

It is, therefore, clear that the excepted cases in section 233, taken singly, do not sanction the trial in the mode in which it was conducted; but it is contended that if the exceptions are taken cumulatively the trial is legal. This depends upon the construction of section 233. The question remains whether they can be taken cumulatively. I submit they cannot be so taken.

The policy of section 233 is plainly designed for the protection of the accused. It is a humane rule for the purpose of preventing confusion, embarrassment, or prejudice to the accused by the very multiplicity of charges. The true construction would therefore be the one that would "suppress the mischief and advance the remedy." See Maxwell on the Interpretation of Statutes (3rd edition), Ch. X, pp. 367 *et seq.* and p. 385.

The natural meaning of the words in section 233 appears to be that the exceptions in section 233 should be taken *singly* and not *cumulatively*. No doubt the exceptions are joined by the word "and". But the words are "except in the *cases* mentioned in sections 234, 235, 236 and 239." This phraseology makes all the difference. We have to look to the *cases* mentioned in the sections and see whether the present trial is covered by any of those *cases* and not by a new case formed by a combination of two or more of those cases. It is, however, clear that section 234 cannot be taken cumulatively with section 239: see *Budhai Sheikh* v. *Tarap Sheikh*[1]. "And" must therefore be read as "or" as far as section 239 is concerned. That being so "and" must be read as "or" with respect to all the sections. It cannot be read "and" and "or" in the same section. Moreover, if the exceptions were not mutually exclusive, why not combine all the sections 234, 235, 236 and 239? This would render the rule

(1) (1905) 10 C. W. N. 32.

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in section 233 perfectly nugatory. It would then be difficult to conceive of any case of misjoinder. If that was intended the Legislature would have used plainer language instead of all this circumlocution and would not make these elaborate provisions for possible contingencies. Besides the limited interpretation would prevent the law being circumvented by the addition of fictitious charges. For example, it is admitted that the offence under section 124A in one transaction cannot be joined with the offence under section 153A in another transaction and tried together. Yet the addition of a fictitious charge under section 124A in the second transaction would enable the Crown to do so if the aid of section 235 or section 236 can be invoked: see *Abdul Majid* v. *Emperor*[1].

Furthermore, section 234 cannot be joined with section 235 as they are mutually destructive. Section 234 looks exclusively to number, time, and sameness of the offences without regard to the number of transactions. Section 235 is the converse of section 234. It looks exclusively to the sameness of the transactions and is indifferent as to the number, time and sameness of the offences. The essential ingredients of section 234 are immaterial in section 235 and *vice versâ*. A combination of the two must end in the destruction of the essentials of each.

It is contended that the word 'section' in section 234 may be read as 'sections', and if that be done, then the offences under sections 124A and 153A in one transaction can be joined with offence under sections 124A and 153A in respect of another transaction because then they are offences of the same kind as they fall respectively under the same sections. But if this be so, it would make no difference whether there are two or twenty offences in each transaction. This would render the protection designed by section 233 practically worthless. There is really no reason to read 'section' as 'sections.' The word "transaction" in section 239 cannot be read in the plural: see *Budhai Sheikh* v. *Tarap Sheikh*[2]. What section 239 is to "transaction", section 234 is to "section." The General Clauses Act does not apply because to read 'section' in the plural is repugnant to the

(1) (1906) 33 Cal. 1256 at pp. 1267-68.

(2) (1905) 10 C. W. N. 32.

context. If the present sections be compared with the sections on the same subject in Act X of 1872, it will be perceived that the Legislature disapproves of such extension in meaning. Section 453 of the old Code (Act X of 1872) is now section 234. In the old section 453 there was an explanation. It referred to the old section 455, which corresponded with the present section 236. The old explanation incorporated what is now section 236, in the very definition of 'offences of the same kind.' Thereby it extended the meaning of the expression 'offences of the same kind': see *Manu Miya* v. *The Empress*(1). But that explanation has no place in the present Code. Its exclusion from the new Code excludes section 236 (old section 455). The legislature has thereby indicated that now section 234 is not to include cognate offences or doubtful sections falling within section 236. *A fortiori* it must exclude other more distinct offences.

In this connection the addition of clause (2) to section 222 makes it clear that the word offence as used in section 234 was not intended to include every act so connected with that offence as to form part of the same transaction: see *Bhagwati Dial* v. *King-Emperor*(2) and *Subrahmania Ayyar* v. *King-Emperor*(3). The whole question whether section can be read as sections and whether the exceptions can be taken cumulatively has been very carefully considered in *Bhagwati Dial* v. *King-Emperor*(2); *Kasi Viswanathan* v. *Emperor*(4); *Nga Lun Maung* v. *King-Emperor*(5); and *Budhai Sheikh* v. *Tarap Sheikh*(6). All these cases hold that the sections are mutually exclusive, and section cannot be read as sections: see also *Bipin Chandra Pal* v. *Emperor*(7); and *Queen* v. *Itwaree*(8); *Queen-Empress* v. *Mulua*(9). The only exception is *Emperor* v. *Tribhovandas*(10) decided the other day by a Division Bench of this Court. But that decision is distinguishable from the present case. In that case there were not distinct charges on sections 124A and 153A but one charge for both.

(1) (1882) 9 Cal. 371.
(2) (1905) P. R. No. 2 of 1905 (Cri.).
(3) (1901) 25 Mad. 61 at p. 73.
(4) (1907) 30 Mad. 328.
(5) (1902) 2 Lower Burma Rulnigs, p. 10.
(6) (1905) 10 C. W. N. 32.
(7) (1907) 35 Cal. 161.
(8) (1863) 6 W. R. 83 (Cri. Rul.).
(9) (1892) 14 All. 502.
(10) *ante* p. 77: 10 Bom. L. R. 801.

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They were regarded by the Appellate Court as alternate charges. The Appellate Court confirmed the conviction on one offence only, *viz.*, section 124A. The sentences were not separate on sections 124A and 153A. There was only one sentence and that within the maximum imposeable under section 153A.

The grounds on which His Majesty will review criminal proceedings are specified in *Queen-Empress* v. *Bal Gangadhar Tilak*[1] and *In re Dillet*.[2] In this case there is an important question of law. Unless corrected the misjoinder will create a precedent that would divert the law into new channels and prove prejudicial to accused in other cases, and open the door to grave mischief and miscarriage of justice. The mode of trial adopted disregarded the forms of legal process. It is desirable to obtain the decision of the highest tribunal in the Empire upon this point. Secondly, if the trial is illegal, there can be no conviction and sentence. The detention of the petitioner in jail is a violation of the principles of natural justice and constitutes substantial and grave injustice. There is now no means of remedying the injustice except by an appeal to the Privy Council. This Court has not to see whether substantial or grave injustice is done, but leave that to the Privy Council. This Court has to make the requisite declaration if a *primâ facie* case is made out. Thirdly, this case goes to the very root of jurisdiction. The Court has no jurisdiction to try a man on such a misjoinder of offences and charges. This is, therefore, a case where the Court should declare that it is a fit case for appeal to His Majesty in Council.

Robertson, Advocate-General, instructed by the Government Solicitor, to shew cause:—No attempt is made to bring this case within the rule laid down by the Judicial Committee of the Privy Council in *Ex parte Carew*[3]. Every irregularity in procedure, as laid down in the Criminal Procedure Code, does not permit a party to go to the Privy Council: but the party seeking for leave must shew that departure from the required procedure has caused substantial and grave injustice to be done. It is not

(1) (1897) 22 Bom. 112 at p. 150. (2) (1887) 12 App. Cas. 459.
(3) [1897] A. C. 719.

sufficient to show that there was an irregularity, and to argue from that that because there was an irregularity there was also an illegality. Some little injustice inevitably results from every irregularity; but section 537, Criminal Procedure Code, is designed to cover such cases. In criminal cases leave is not given to appeal to the Privy Council upon the ground of a violation of a technical rule of procedure: see *Dinizulu* v. *Attorney-General of Zululand*[1]. No prejudice was caused to the accused in his trial by the joinder of charges, nor was there any violation of an express provision of the law. As to when special leave to appeal is granted, see Safford and Wheeler's Privy Council Practice, pp. 755, 756, 757; *Attorney-General of New South Wales* v. *Bertrand*[2].

'Offence' is defined in section 4 (*o*), Criminal Procedure Code, as any act or omission made punishable by any law for the time being in force. The offence is the act or omission and it is with the act or omission that a man is charged. Here the acts are the publications on two different dates. There are, therefore, only two offences though the acts constituting such offences are punishable under different sections of the Code. The word 'act' may be compared with the word 'game'. Game is a general or a particular term. The game of golf, or cricket, &c., or one, two or more games of golf, &c. In the same way the word offence may be used in a general or a particular sense. The act constituting the offence may be punishable under several sections defining particular offences. The word 'offence' is used in a general sense in some sections of the Code and in a limited sense in others. In section 233 it is used strictly according to the definition meaning. The section does not say that for every act punishable under several sections the accused should be tried separately. What section 234 looks to is the 'act,' *i. e.*, the general offence and not the particular one. This case is governed by the ruling in *Emperor* v. *Tribhovandas*[3].

The two articles formed part of the same transaction. If both articles could be charged under section 124A and tried at one trial under section 234, Criminal Procedure Code, the mere addi-

(1) (1889) 61 L. T. 740. (2) (1867) L. R. 1 P. C. 520 at p. 530.

(3) *ante* p. 77 : 10 Bom. L. R. 801.

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tion of a charge under section 153A in respect of the second article has not caused grave and substantial injustice. No suggestion is made that the accused was embarrassed in his defence. The accused himself said in his statement that the two articles formed part of one controversy.

Section 235, cl. (1), Criminal Procedure Code, applies to this case, because a series of articles were published by the accused forming part of the same transaction, namely, that of defaming the Government. Section 235 cl. (2) also applies. 'Offence' in this clause is used in a distributive sense. One act may give rise to several offences.

Section 233, Criminal Procedure Code, mentions as exceptions "sections 234, 235, 236 and 239." The word 'and' indicates that the Legislature did not mean these sections to be mutually exclusive.

Section 236 also applies, if the charge under section 153A is considered to be an alternative charge; and there is nothing in the mode in which the charges are framed in this case which militates against this view. In a trial under s. 236 it is not necessary that conviction should only be as regards one offence: the accused may be convicted on each of the offences charged.

As regards sentences, if the trial is legal, then the sentences are legal. Unless the trial is set aside the Privy Council will not interfere with the sentences.

Baptista in reply:—"Act" and "offence" are not synonymous terms. Acts are not charged but offences are charged, and acts are only mentioned to give notice of the way in which the offence is committed. One act may give rise to many distinct offences. If a man fires a gun in a crowd where Police officers are doing duty he may hurt one, cause grievous hurt to another, murder a third, set fire to a house, and injure or kill Police officers. One single act of firing the gun would thus result in many offences. Offences are committed not by acts alone, but acts and their consequences, though juridically all these are acts. Similarly, if a man publishes an article whereby he defames A, B and C, he commits three distinct offences of defamation. So one publication may give rise to two offences under section 124A and

section 153A of the Indian Penal Code, but they are nevertheless distinct offences and those offences are charged and not the act of publication. The act of publication is really one of the series of acts which constitute one transaction. The series of acts consist in writing each word of the article, delivering the written article to compositors, etc., and finally the publication in the newspaper.

The two articles do not form part of the same transaction. The accused said so in so many terms. The version of the official short-hand writer is not correct. The correct version is that given by the short-hand writer engaged by the accused and that, I understand, tallies with that of the short-hand writer engaged by the prosecution. Apart from this the accused cannot be pinned down to every word he utters in a charge to the jury or in urging his objections. It is quite clear from the points asked to be reserved that he regarded the transactions as distinct or else he could have no objection to the joinder of charges. Parties cannot make transactions the *same* if they are *distinct* in the eye of the law. As to what constitutes the same transaction, see Stephen's definition quoted in Cunningham on Evidence (7th edn.), p. 92. The point was fully considered in *Queen-Empress* v. *Fakirappa*[1]; *Queen-Empress* v. *Vajiram*[2]; *Emperor* v. *Punya Naika*[3]; and *Emperor* v. *Sherufalli*[4]. The publications of the 12th May and 9th June cannot form the same transaction. The authors are distinct persons. This we would have proved but Mr. Justice Davar ruled that the transactions were not the same. The accused of course accepted the full legal responsibility but not the authorship. Secondly, the subjects are not the same. There is no continuity. There is an interval of nearly one month. The Crown regarded this as distinct transactions. The sanctions under section 196, Criminal Procedure Code, were distinct, one for each article. In the Criminal Sessions of the High Court the Crown applied for a Special Jury for each case and two Special Juries were ordered by the Judge. The Judge did not regard the transactions as the same. The Jury too went on that

(1) (1890) 15 Bom. 491.
(2) (1892) 16 Bom. 414 at p. 424.
(3) (1902) 4 Bom. L. R. 789.
(4) (1902) 27 Bom. 135: 4 Bom. L. R. 980.

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basis and brought in distinct verdicts. In the face of two sanctions, two complaints, two warrants, two inquiries, two committals, two applications for Special Juries by the Crown, two convictions and two sentences on section 124 A alone, a third conviction on section 153 A and an acquittal on the second section 153 A, it is impossible now for the Crown to contend with any fairness that the two articles constitute the same transaction.

SCOTT, C. J.—This is a rule granted by us on a petition for a certificate that the decision of the judge and jury in the case of *Emperor* v. *B. G. Tilak*[1] is a fit subject for appeal to His Majesty in Council.

Before granting the rule we required counsel for the petitioner to specify the grounds upon which he was prepared to support his application. He then argued that a certificate should be granted as prayed for each of the reasons specified in paragraphs 32 to 35 of the petition. After hearing his arguments we decided that it was unnecessary to call on the Crown to show cause upon any points, except points (*h*) (*s*) and (*t*) of paragraph 32 of the petition and we accordingly granted a rule upon those points only.

The rule has now been argued. We can only grant the required certificate if in our opinion the case is a fit one for appeal. The test of fitness is furnished by various decisions of the Judicial Committee which show the circumstances under which they will entertain appeals in criminal cases. It is sufficient to refer to *Ex parte Carew*[2] and *Dinizulu* v. *Attorney-General of Zululand*[3], in both of which the judgment was delivered by Lord Halsbury. In the former case the rule was stated thus: "It is only necessary to say that, save in very exceptional cases, leave to appeal in respect of a criminal investigation is not granted by this Board. The rule is accurately stated as follows, in the case to which their Lordships referred in the course of the argument: *In re Dillet*[4], 'Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or

(1) (1908) 10 Bom. L. R. 848.
(2) [1897] A. C. 719.
(3) (1889) 61 L. T. 740.
(4) (1887) 12 App. Cas. 459.

by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.' In the latter case the Lord Chancellor said: "It appears to them that nothing could be more destructive to the administration of criminal justice than a sort of notion that any criminal case which was tried in any colony from which an appeal lay to this Committee can be brought here on appeal, not upon the broad grounds of some departure from the principles of natural justice, but because some form or technicality has not been sufficiently observed. That is a principle, which they believe, never has been permitted, and never, they trust, will be permitted." Therefore, before granting the certificate asked for, we must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

We are not sitting as a Court of error. It is not for us to decide whether such injustice has in fact been done. We have merely to be satisfied that a reasonable case has been made out. The petitioner was tried before Mr. Justice Davar and a special jury on a charge framed under section 124A, Indian Penal Code, in respect of an article published in the *Kesari*, of which he was editor and proprietor, on the 12th of May 1908, and on another charge under section 124A and one under section 153A in respect of an article in the *Kesari* of the 9th June 1908. He was found guilty and sentenced on each of the first and second charges to three years' transportation, and on the third charge to a fine of Rs. 1,000.

It is now argued that the trial was illegal as being in contravention of the provisions of section 233, Criminal Procedure Code, which lays down that for every distinct offence there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 234, 235, 236 and 239.

The accused was originally charged separately before the Chief Presidency Magistrate on the 29th June, under sections 124A and 153A in respect of the article of the 12th May, and under the same sections in respect of the article of the 9th June.

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He was committed to the High Court Sessions for trial on both sets of charges.

In the Sessions Court (as appears from the note of the official short-hand writer corrected by the learned Judge) the Advocate-General appearing for the prosecution asked that the accused should be tried on the four charges at one trial, contending that the articles forming the subject of the charge, and certain other articles intermediate in point of time, formed one transaction, in which the offences charged had all been committed, and that therefore, the joinder was permissible under section 235 (1), Criminal Procedure Code. The learned Judge objected, that if the charges were consolidated, there would be four charges. The Advocate-General then said he would not put the accused upon the charge under section 153A, in respect of the first article.

The accused, who conducted his own case, with the assistance of several well-known lawyers, objected first, that there was no provision of the Code by which different charges could be amalgamated as proposed, and, secondly, that though the articles were in the course of the same transaction, yet they formed different subjects altogether, and it would be more convenient to have them tried separately, and confusing if they were taken together, that sections 234 and 235 were permissive, while section 233 was imperative, that the articles were separate articles dealing with separate aspects of the question, and did not form part of one transaction. Eventually, the learned Judge said he thought it would be extremely desirable, and in the interest of the accused himself, that there should be one trial, and that the whole question should be before one jury; the accused under section 233 was entitled to be tried separately, unless the provisions of sections 234, 235, 236 and 239 came into operation. He had grave doubts as to the applicability of section 235 as there would be some difficulty in holding that separate newspaper articles written week after week would come under the same transaction, but he had no difficulty in ordering the trial under section 234 provided the charges did not exceed three. The trial then commenced on three charges, one under section 124A on the article of the 12th May, and one

under section 124A, and another under section 153A, on the article of the 9th June, with the result above stated.

After the verdict and before sentence the accused applied that certain points should be reserved and referred, under section 434, Criminal Procedure Code, for the decision of a Full Bench. The points mentioned are included in the points raised in the present petition. The Judge, however, declined to reserve any points.

Dealing now with the legal argument addressed to us that the trial was altogether unlawful, as having been in contravention of the terms of section 233 it is apparent that the argument involves two assumptions: (1) that the offences charged were not "committed by the same person in a series of acts so connected together as to form the same transaction," and therefore did not fall within the scope of section 235 (1); and (2) that the exceptions mentioned in section 233 are mutually exclusive. The justification for the first assumption is by no means apparent. Besides the preliminary discussion upon the point to which we have already referred, we note that at the trial in addition to the articles of the 12th May and 9th June other articles and notes published by the accused in the *Kesari*, from the 12th May to the 9th June inclusive, were put in (Exhibits E to I). The Judge in his charge to the Jury pointed out that the subject of all the articles, including those the subject of the charge, was the advent of the bomb. The accused himself when opening his defence read to the Court a written statement in which he stated that the charged articles were part of a controversy in which he had endeavoured to maintain and defend his views in regard to the political reforms required in India at the present day. In this connection we may also refer to paragraph 36 of the petition now before us. We think, therefore, that there are good reasons for the contention placed before us by the Advocate-General that the charges all fall within the scope of section 235 (1).

Assuming, however, that the Advocate-General's contention just referred to is unsustainable, the petitioner has still to make good the second assumption, namely, that the exceptions mentioned in section 233 are mutually exclusive. The words of the section do not favour this view. If it had been intended

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that section 235 (2) or section 236 could not be made use of in co-operation with section 234, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of sections 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

For example, if A were charged with three thefts in buildings within the year and the evidence established that in one case the theft was committed on the roof and not in the building the accused could not be convicted of simple theft under the powers conferred by section 237 because the applicability of section 236 would be negatived by the mere fact of the joint trial under section 234.

We find it difficult to believe that the Legislature intended that a joint trial of three offences under section 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. For these reasons we think that the exceptions are not necessarily exclusive; and that sections 235 (2) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

It is of course possible for ingenuity to suggest cases in which the full exercise by the Court of the permissive powers conferred by the sections which we have been discussing may produce embarrassment. In such cases the discretionary power of the Court still remains to decline to avail itself of its full powers.

The view which commends itself to us was also taken by another Bench of this Court in the recent case of *Emperor* v. *Tribhovandas*.[1] In our opinion the learned Judge (though he appears to have overlooked section 234 (2)) might have allowed the trial to proceed on all four charges without violating the provisions of the law.

If we now for the purpose of argument assume that the petitioner has established the second assumption also, we have

(1) *ante* p. 77: 10 Bom. L. R. 801.

still to be satisfied that reasonable grounds exist for thinking that grave and substantial injustice may have been done at the trial before we can grant the certificate. As we understood the argument on the rule it is not contended that injustice has been done except in so far as the alleged disregard of the provisions of Criminal Procedure Code in itself constitutes an injustice but we were urged to grant a certificate as the case would be important as a precedent.

We do not think the accused was in any way prejudiced by what took place at the trial. An accused person may it is clear be legally tried and convicted in one trial, under section 124 A or section 153 A, on charges framed on three disconnected articles. How then can it be said that grave and substantial injustice has been done by the arraignment and conviction of the accused on three cognate charges in respect of only two (and those not disconnected) articles?

As regards the question raised by paragraph 32 (*s*) and (*t*) of the petition with respect to the number of separate sentences imposed, the jury found the accused guilty of three distinct offences and the Judge awarded a punishment for them which in the aggregate is much below the maximum punishment allowed for one of the offences under section 124 A. There has, therefore, been no violation of the provisions of section 71 of the Indian Penal Code.

For the above reasons we discharge the rule.

Before leaving the case, however, we think it right to point out that the Advocate-General, according to the note of the official short-hand writer, stated that the charges under sections 124A and 153A would be treated as being alternative charges or charges framed in order to meet the possibility of one or the other set of facts being proved, in which case each offence might or might not be proved. This may mean either that the second and third charges fell under section 235 (2), or that they fell under section 236. The charges as framed were not expressed to be in the alternative, and the verdict of guilty was given in respect of each charge separately. There was, we think, nothing illegal in this; but if it was the intention of the Crown that the

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second and third charges should only operate alternatively the result intended can now be arrived at by the exercise by the Government of its powers under Chapter XXIX of the Criminal Procedure Code in respect of the sentence imposed under section 153A upon the third charge.

Rule discharged.

R. R.

ORIGINAL CRIMINAL.

Before Chief Justice Scott and Mr. Justice Batchelor.

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September 29.

IN RE NARASINHA CHINTAMAN KELKAR.

Contempt of Court—Criticism of Judge—Language used in criticism which strikes at the root of all respect for the Court.

Any act done or writing published, calculated to bring a Court or a Judge of the Court into contempt or to lower his authority, or to obstruct or interfere with due course of justice or the lawful process of the Court is a contempt of Court.

Judges and Court are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, it is not a contempt of Court.

Reg. v. *Gray* (1), followed.

THIS was a rule calling upon Narsinha Chintaman Kelkar, editor of the "Mahratha," to show cause why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of defamatory passages concerning the Honourable Mr. Justice Davar, contained in an article published by him in the issue of his newspaper dated the 26th July 1908.

The rule nisi was in the following terms :—

Upon reading the affidavit of J. C. G. Bowen, Acting Public Prosecutor, Bombay, sworn on the 12th day of September 1908 and after hearing the Advocate-General, Bombay, who applies that a rule nisi be issued against Narsinha Chintaman Kelkar, Editor and Publisher of the 'Mahratha' newspaper, requiring him to shew cause, if any he has, why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of an

(1) [1900] 2 Q. B. 36 at p. 39.

article published by him on pages 349, 350 and 351 of the issue of the said newspaper dated the 26th July 1908 containing certain contemptuous and defamatory matters of and concerning the Honourable Mr. Justice Davar, one of His Majesty's Judges of the High Court, Bombay, and more particularly in respect of the following passages printed and published in the said newspaper.

* * * * *

It is ordered that the said Narsinha Chintaman Kelkar do appear before this Honourable Court on Wednesday next the 23rd of September 1908 to show cause why he should not be committed in respect of the said article. And it is further ordered that this rule be served on the said Narsinha Chintaman Kelkar through the District Court of Poona.

At the hearing Mr. Kelkar put in the following affidavit:—

I, Narsinha Chintaman Kelkar, of Poona, Hindu inhabitant, at present temporarily residing at Sardar Graha, Esplanade Road, outside the Fort of Bombay solemnly affirm and say as follows. I am a regular resident of Poona and have no permanent residence or fixed place of abode in Bombay and have come to Bombay to answer the rule issued against me. I am the editor and publisher of the 'Mahratha,' weekly paper printed and published in Poona. I am not the proprietor or manager of the paper. I admit that I wrote the article forming the subject-matter of the present notice and accept full responsibility for the same. I followed the course of the trial keenly as a personal friend of Mr. Tilak and wrote the article immediately after his conviction and hence there is a certain amount of feeling in it, but I say that in writing the article I had no desire and no intention whatever to scandalise this Honourable Court or any of the Judges thereof or to defame the Honourable Mr. Justice Davar or any other Judges of this Honourable Court. I had also no desire and no intention to interfere in any way with or obstruct the course of administration of justice. The article was written after the whole trial was finished. I honestly and conscientiously believed myself called upon as a journalist to comment on certain features of the case and to offer certain expostulations about certain things said and done in the course of the case and also to protest against certain extrajudicial expressions of opinion which, I felt, did not do justice to the character and motives of Mr. Tilak. I wrote the article in the discharge of what I believed to be my duty as a journalist and an exponent of public opinion so far as I could claim to voice it. The article was intended as a fair and legitimate comment on a matter of public interest and nothing more. With this explanation of my motives and intention and the circumstances under which the article was written, I place myself unreservedly in the hands of this Honourable Court.

On 23rd September the Rule came on for hearing.

Baptista, to show cause:—I will divide my arguments into two parts: (1) Did the publication of the article constitute contempt of Court? And (2) if it did, was it necessary in the

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interests of administration of justice that the Court should exercise its power to commit for contempt on the present occasion ?

(1) The law is that so long as a case is pending no one can say or do anything which may be calculated to interfere with the course of administration of justice, but once the case is over both the Judge and the Jury are handed over to public criticism. The comments made on Mr. Justice Davar are criticisms upon him in his personal capacity. The writer has drawn distinction between the Judge as a Judge and the Judge in his personal capacity. Comments on a Judge in his personal capacity came within the rule laid down in *In the Matter of a Special Reference from the Bahama Islands*[1]. Comments on Mr. Justice Davar as Judge do not exceed fair and legitimate criticism. There is no intention to vilify or bring the Court into contempt. We expressly repudiate any such intention in our affidavit. There is no word of aspersion on the integrity of the Judge. There is an amount of feeling imported in the article, because Mr. Kelkar is Mr. Tilak's personal friend and associate for many years, and wrote the articles under the influence of a great feeling.

(2) The power of committing a person for contempt is very sparingly exercised by Courts; it has almost become obsolete in England: see *McLeod* v. *St. Aubyn*[2]. It has always been exercised in the interests of the administration of justice only; see *Dallas* v. *Ledger*[3]. In this case there was no interference with administration of justice in any way, and committal for contempt is therefore not necessary to promote due administration of justice.

Jardine (officiating Advocate-General) in support of the rule :— The article in question suggested that the Court was deliberately partial in the trial of the Tilak case; that the Judge was acting in collusion with the Government in hurrying the trial to a conclusion; and that the Judge deluded Mr. Tilak by protestations of his desire to protect Mr. Tilak's interest into a false security

(1) [1893] A. C. 138. (2) [1899] A. C. 549.
(3) (1888) 4 T. L. R. 432 at p. 434.

which disappeared when the proceedings came to an end. Mr. Kelkar was up to the last time given an opportunity by your Lordships to express his regret but he has not availed himself of it. He must, therefore, be taken to be prepared to stand or fall by what he has written in his paper. He has directly challenged the purity of the Court. For the purpose of contempt of Court it is immaterial to consider whether the comments were made on Mr. Justice Davar as a Judge or as a gentleman. Whatever Mr. Justice Davar did or said was in his judicial capacity and in no other capacity. The Press has a full right to criticise a trial after it is finished, but the criticism should be couched in proper terms and no derogatory expressions should be used in connection with the presiding Judge. The decision in *In the Matter of a Special Reference from the Bahama Islands*[1] does not apply. The Judge there did something that was extra-judicial. In the article in question the writer has made statements which go to show that the administration of justice in the High Court is not pure.

SCOTT, C. J.—On the 16th September, we granted a rule, at the instance of the Advocate-General, calling on Narsinha Chintaman Kelkar, as editor and publisher of the "Mahratta" newspaper, to show cause why he should not be committed, or otherwise dealt with according to law for contempt of Court in respect of an article published by him in the issue of the said newspaper of the 26th of July 1908, containing certain contemptuous and defamatory matter of, and concerning Mr. Justice Davar, one of the Judges of this Court. The accused has put in an affidavit in which he admits that he wrote the article, but defends it as fair and legitimate comment, on a matter of public interest (namely, the trial of Bal Gangadhar Tilak) written after the trial was finished in the discharge of his duty as a journalist.

The article, which is in English and divided into seven paragraphs, suggests very plainly in the third paragraph that at the trial the conviction of the accused was secured by Government by the collusion of the presiding Judge; that the Judge, in allowing

(1) [1893] A. C. 138.

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only half an hour for the midday adjournment realized the importance of finishing the trial on the day before the Indian Budget debate in Parliament, and that by means of significant hints to the Advocate-General, and unusual haste in closing the proceedings the net was woven around the life of the accused surreptitiously, in the closing vesper hours. These suggestions appear to rest upon no more solid basis than the fact that, as happens from time to time in criminal trials in the High Court, the sitting was prolonged after the usual hour of rising on the last day of the trial in order to finish the case that evening.

In the fifth paragraph of the article the honesty of the Judge is again the subject of attack. He is said to have been guilty of affectation in the solicitude he expressed for the accused during the trial and that when the moment for the charge to the jury had arrived, everything was changed, for as soon as the Judge had found his liberty of speech, he made every point against the accused, taking upon himself to bestow a one-sided and adverse treatment on the incriminating articles and trying to make the case more complete for the prosecution, than the Advocate-General himself had done, by ferreting out hidden words and hidden innuendoes, which were never touched by counsel for the Crown. We have had occasion recently to examine the proceedings at the trial on the application of the accused for leave to appeal to His Majesty in Council, and we consider that there is no justification whatever for such remarks.

In the sixth paragraph of the article the writer states that he is going to blame Mr. Davar the gentleman and not Mr. Davar the Judge, and then proceeds to discuss certain remarks of the Judge uttered in his judicial capacity when passing sentences; referring to the Judge as a medical quack in a red robe, as an enemy of the accused, privileged to sit upon the Bench, as an impudent glow-worm holding his torch to the Sun.

Counsel for N. C. Kelkar has not attempted to justify the passages to which I have referred, but has claimed that a Judge after the trial is over, is handed over to criticism and that the article amounts to criticism and nothing more. In my opinion the article far oversteps the bounds of fair criticism. It attacks

the independence and honesty of the Judge without any justification and indulges in scurrilous abuse of him in his character of a Judge presiding at the Criminal Sessions of this Court.

I can make no remarks on this case more appropriate than those contained in the following passages from the judgment of the Lord Chief Justice of England in *Reg.* v. *Gray* (1).

It is not too much to say that it is an article of scurrilous abuse of a judge in his character of a judge . . . It cannot be doubted . . . that the article does constitute a contempt of Court . . . Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court . . . Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C., characterised as 'scandalising a Court or a Judge.' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested . . . or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism : I repeat that it is personal scurrilous abuse of a judge as a judge. We have therefore to deal with it . . . *brevi manu.*"

The position of N. C. Kelkar has not been improved by the defiant attitude taken up by counsel upon his instructions. Although every opportunity was given to him to submit and apologise, it was stated to the Court that he thought it more manly and straightforward to wait and see whether the Court found him guilty before offering any apology or submission.

This is a very serious case and must be met by a suitable sentence not only as a punishment for this particular contempt, but also as a warning to other persons.

(1) [1900] 2 Q. B. 36 at p. 39.

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BATCHELOR, J.—The article in respect of which this rule was granted, appeared in the English language in the respondent's newspaper, the "Mahratta." The article itself proves, and Mr. Baptista has admitted before us, that the respondent is perfectly familiar with English. The only question, therefore is, as to the meaning of the article, read as a whole and construed as it would be construed by the ordinary reader. Upon the best consideration that I can give to the article, I am clear that it constitutes a gross instance of that form of contempt of Court, by which, as it is said, the Court is scandalised. Nor is any serious attempt made to disguise this meaning. After a preparatory paragraph of no special consequence the writer proceeds at once to his thesis, and observes that "in the first place they (the public) will know what value to attach or what sense to apply to the expression that Mr. Tilak got a fair trial." Then after other allusions to the "unfairness of the trial," the writer promises to speak later of "the unfairness of the Judge." He keeps his promise in the succeeding paragraphs, which abound in scurrilous references to the "mockery of a trial," to the "affectation" of the Judge, who is represented as concealing his hostility to the prisoner until the time came to charge the jury when, we are told, he laboured, by a one-sided and adverse treatment of the articles, and by ferreting out hidden words and innuendoes unnoticed by the Advocate-General, to make the case for the prosecution more complete than Counsel for the Crown had made it. I entirely agree with that part of Mr. Baptista's address in which he insisted that, upon the conclusion of a trial, the Judge is handed over to criticism; but in my opinion, such writing as this is not criticism and is entirely beyond the reach of the argument. I agree, too, that the Court should ordinarily be slow to punish for contempt, especially where there is any ground for hope that the common sense of the many will correct the extravagance of an individual; but here I cannot doubt, that the unchecked dissemination of such views as are stated in this article, would tend to create the opinion which the respondent has expressed in his newspaper, though he does not maintain it in this Court. For among large numbers of the less instructed people of this country the groundlessness of an opinion is no obstacle to its prevalence; and it

is plain that nothing could well be more prejudicial to the administration of justice than the prevalence of such opinions as the respondent has published broadcast for the acceptance of the readers of his paper. As to the distinction which it was sought to establish, both by the respondent in his article, and by his counsel in argument, between the personal and judicial character of the Judge, I am of opinion that no such distinction exists, inasmuch as whatever was done and said by Mr. Justice Davar at the trial, was done and said by him in his judicial capacity alone.

Despite the force of these considerations, we hoped, up till the end of the hearing, that we might be able to extend to the respondent the same clemency which we had shown to similar offenders connected with another journal, but the respondent has put it out of our power to follow this course by the contumacious attitude which he has elected to adopt. In reply to questions and suggestions from the Bench, Mr. Baptista informed us that he had no instructions to express apology or regret, and that his client desired him to leave the matter to the Court on that footing. That being so, I think that we have no option but to mark our sense of the respondent's misconduct by the imposition of substantial punishment. The only circumstances of mitigation which I am able to discover are that the trial had concluded when the article was published and, as I am prepared to believe, that the respondent was partly misled by his friendship for the prisoner. On the other hand, it must be remembered that the respondent is himself a Pleader, and could scarcely have failed to realise what mischief would follow from such language as he has employed, language which strikes at the root of all respect for the Court and its authority. It must be understood that this is the ground upon which the Court is acting, and not from any desire to vindicate Mr. Justice Davar from the respondent's misrepresentations. It is in the interests of the due course of justice, and of the authority of this Court, that I conceive it to be our clear duty to take notice of respondent's misconduct. I have said that there has been no expression of regret; and that obliges me to go a little further and notice specifically the position taken by the respondent in

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this Court. When definitely questioned upon the matter, Mr. Baptista, so far as I was able to understand him, said that his client considered it would be more honest or manly to defer any expression of regret until the Court had pronounced its judgment. The plain English of this seems to be that the respondent will wait till other means of escaping punishment have proved unavailing, before he considers the desirability of expressing regret for his misconduct. That is a course in which I can see some indication of policy; but its connection with manliness or honesty is certainly remote.

For these reasons I agree with the order[1] to be made.

R. R.

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(1) The order made by the Court was as follows :—

Whereas by an order dated the 16th day of September 1908 stating that on reading the affidavit of J. C. G. Bowen, Acting Public Prosecutor, Bombay, sworn on the 12th day of September 1908, and after hearing the Advocate-General of Bombay who applied that a Rule *Nisi* should be issued against the abovenamed Narsinha Chintaman Kelkar requiring him to show cause, if any he have, why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of an article published by him on pages 349, 350 and 351 of the issue of the newspaper entitled "The Mahratta" and dated the 26th July 1908, containing certain contemptuous and defamatory matters of, and concerning the Honourable Mr. Justice Davar, one of His Majesty's Judges of the High Court, Bombay, and more particularly in respect of the passages set out in the said order. It was ordered that the said Narsinha Chintaman Kelkar should appear before this Honourable Court on Wednesday the 23rd day of September 1908 to shew cause why he should not be committed in respect of the said article, and the said Narsinha Chintaman Kelkar attending this Honourable Court on the 23rd day of September 1908 pursuant to the said order, and the affidavits and exhibits filed in this matter being read and upon hearing Mr. Baptista of Counsel for the said Narsinha Chintaman Kelkar and the Honourable the Advocate-General of Counsel and this Court, after taking time to consider the matter, being of the opinion that the said Narsinha Chintaman Kelkar has, by publishing the said article in the said issue of the said newspaper, been guilty of a contempt of this Honourable Court, Doth Order that the said Narsinha Chintaman Kelkar do pay a fine of Rs. 1,000 and a further sum of Rs. 200 for costs and do stand committed to His Majesty's Common Prison at the Criminal Side for a period of 14 days from the date hereof and for such further term as may elapse until the said fine and costs imposed upon him by the said order have been paid and until he shall have made suitable submission and apology to this Court.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

GANGASHANKAR PRABHASHANKAR, PLAINTIFF, *v.* BADHUR MADHBHAI AND OTHERS, DEFENDANTS.* 1908. *October* 15.

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 7(1)*— Defendant summoned for examination—Payment of batta.*

It is not necessary to pay *batta* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The *batta* is not payable by the plaintiff and the suit is not liable to be dismissed on failure to pay it.

CIVIL reference under section 617 of the Civil Procedure Code (Act XIV of 1882) by J. N. Bhatt, Subordinate Judge of Borsad, in the Ahmedabad District.

The plaintiff filed a suit against Badhur Madhbhai and others in the Court of the Subordinate Judge of Borsad in its Small Cause Jurisdiction. The defendant being an agriculturist, section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was applicable and an agriculturist summons was ordered to be issued according to Form LXXXVIII at page 201 of the High Court Civil Circulars. The form was prepared in conformity with the provisions of section 7 of the Dekkhan Agriculturists' Relief Act which requires that in every suit the defendant shall be examined as a witness. The plaintiff was required to pay *batta*

* Civil Reference No. 4 of 1908.

(1) Section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

7. *Summons to be for final disposal of suit*:—In every case in which it seems to the Court possible to dispose of a suit at the first hearing, the summons shall be for the final disposal of the suit.

Court to examine defendant as witness:—In every suit the Court shall examine the defendant as a witness unless, for reasons to be recorded by it in writing, it deems it clearly unnecessary to do so.

Explanation:—The compulsory examination of the defendant shall not be dispensed with merely by reason of the fact that the defendant has filed a written statement.

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for the attendance of the defendant as a witness and he refused to pay it on the grounds that there was no provision in the Civil Procedure Code (Act XIV of 1882) to compel a party to pay *batta* to a witness not summoned at his request, and that it was not necessary at all to pay *batta* to a defendant for being examined by the Court. Owing to the said contentions the Subordinate Judge submitted the following questions for an authoritative determination :—

"(1) Whether it is necessary to pay *batta* to an agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act?

(2) If it is, whether the same is payable by the plaintiff and whether the suit is liable to be dismissed on failure to pay it?"

The opinion of the Subordinate Judge was in the affirmative on the first question and in the negative on the second question for the following reasons :—

As regards the first question, I have the honour to observe that there are sections in the Civil Procedure Code (Proviso to section 36, section 66, section 120) which authorise a Court to direct that a party shall appear in person. But the consequences of non-appearance or dismissal of the suit of the plaintiff are a decree against the defendant or some lesser punishment affecting his interest in the suit (section 107). But there seems to be no provision in the Code that a party's presence shall be enforced by arrest, or proclamation or attachment of property just as there is provision to enforce the presence of a witness summoned to give evidence or produce a document, by warrant, proclamation or attachment (sections 168, 169, 174) if he fails to appear in response to the summons. In this connection the difference between the form of summons to a witness to give evidence (Form No. 125, Sch. IV, Civil Procedure Code) and the forms of summonses to a person for examination under section 267 (Form XIII at page 167, High Court Civil Circulars) and to a party for examination under section 287 (Form XXVI at page 169, High Court Civil Circulars) may be noted. In the former there is a penal clause drawing the witness's attention to the consequences of non-attendance whereas the latter two forms are silent as to the consequences. This difference in the forms indicates that the appearance under the latter two summonses is not obligatory and supports the view that there is no provision in the Code to enforce the presence of a person summoned otherwise than *as a witness*. If this view is correct, as I think it is, it is necessary for a Court if it has to secure the appearance of any person, be he a party to the suit or not, to issue a witness summons in the first instance. I am humbly of opinion that the Legislature had in mind this view

of the law when it enacted in section 7 of the Dekkhan Agriculturists' Relief Act that the defendant shall be examined *as a witness*. The words italicised have reference to the procedure to be adopted in securing the defendant's presence.

Whether a party ordered to appear in person and failing, can be proceeded against under section 174, Indian Penal Code, depends on the question whether the process was compulsory. A party failing to appear under the proviso to section 36 or section 66 cannot in my opinion be proceeded against criminally. Even if we assume that a party can be so proceeded against, liability to be criminally tried does not serve the direct purpose of the Court, which is to require his presence for examination. Unless the Court can issue a warrant for arrest, the presence cannot be enforced and for this purpose it becomes necessary to issue a witness summons in the first instance.

The point however does not seem to be free from doubt. For it may be argued contrary to what has been said above (1) that notwithstanding the absence of express provision as to issue of warrant in cases other than those of defaulting witnesses, a Court has inherent power to enforce its process and that the absence of such power would render the issue of summonses under sections such as sections 148, 267, 287, a futile procedure, as is not infrequently the case when a defendant is ordered to appear under section 287; (2) that section 171 seems to imply that it is not necessary to summon a party as a witness if the Court desires to examine him the words being "if the Court at any time thinks it necessary to examine any person other than a party to the suit, &c."

The next question is whether the plaintiff can be called upon to pay the *batta*. In the first place, the duty under section 7 of the Dekkhan Agriculturists' Relief Act, is imposed on the Court and not on the party. So it appears awkward that the Court of Justice should demand from the plaintiff *batta* to accomplish that which the Legislature requires of the Court. Besides to push the interests of an agriculturist to the extent of enforcing his presence in Court at the plaintiff's expense could hardly have been contemplated by the Legislature. In the second place, under the Civil Procedure Code, *batta* can be demanded from a party only if a witness summons is issued at his instance (section 160). No doubt, there are the words "subject to the rules of the Code, &c.," in section 171; but they could not have been meant to make any party pay the *batta* of a Court witness. Much less, can a Court by examining a party under section 7, Dekkhan Agriculturists' Relief Act, impose on the plaintiff a liability to pay *batta* to the defendant, for section 178 must be read in conjunction with section 160. Thirdly, there would have been no necessity for such resolution as is referred to in Circular 27 of the High Court Civil Circulars at p. 13, if a party were to be made liable for *batta* of a Court witness. For all these reasons I think that a plaintiff is not liable to pay the *batta* and that his suit cannot be dismissed on failure to pay it.

This question again does not appear to be free from doubt, as it is arguable from an opposite point of view as under :—

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1. In section 267 of the Civil Procedure Code, there is an indication of Court's power to throw on any party the expenses of a summons to be issued by it of its own motion. The last words of the section are "and before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued."

2. Though the High Court Civil Circulars at p. 13 shows that advances are to be made by Government in the first instance, they are to be refunded under the Circular from the amount realised in execution. This means that one of the parties is ultimately to bear the expenses of summons issued by the Court of its own motion. Why not then, should the expenses be borne at the commencement in such a case as the present?

G. N. Thakore (*amicus curiæ*), for the plaintiff.

N. K. Mehta (*amicus curiæ*), for the defendants.

SCOTT, C. J.:—The two questions referred for our opinion are:—

(1) Whether it is necessary to pay *batta* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act?

(2) If it is, whether the same is payable by the plaintiff and whether the suit is liable to be dismissed on failure to pay it?

We answer both questions in the negative.

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

1908. *November* 16.

THE GOVERNMENT PLEADER, HIGH COURT, BOMBAY, APPLICANT, *v.* JAGANNATH MORESHVAR SAMANT, OPPONENT. *

Bombay Regulation II of 1827, section 56 (1)*—Pleader—Misbehaviour—Suspension of Sanad—High Court's disciplinary jurisdiction.*

Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training

* Civil Application No. 523 of 1908.

(1) Material portion of section 56 of Regulation II of 1827 is as follows:—

A pleader accused of a criminal offence, or guilty of misbehaviour or neglect of duty, shall be liable to be suspended or dismissed.

and practice gives them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt.

A pleader, who presides at a public meeting and therein procures the passing of a resolution contemptuously denouncing or protesting against the conduct of a High Court Judge in passing sentence at a trial at the Criminal Sessions, is guilty of misbehaviour (under section 56 of Bombay Regulation II of 1827).

APPLICATION of the Government Pleader, Bombay, under section 56 of Bombay Regulation II of 1827, for the exercise of the High Court's disciplinary jurisdiction against the opponent with reference to his conduct.

The opponent, who practised as a pleader in the Sholápur District, presided at a public meeting held at Sholápur on the 30th July 1908 to express sorrow for and sympathy with Mr. Tilak for the punishment awarded to him by the High Court of Bombay at a trial in one of the Criminal Sessions in the year 1908. One of the resolutions passed at the meeting reflected upon and denounced the conduct of the Judge who presided at the trial. The Government Pleader of Bombay, thereupon, applied for and obtained a *rule nisi* requiring the opponent to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court in respect of his conduct at the meeting in connection with the said resolution.

H. C. Coyaji (with *G. S. Mulgaumkar*) appeared for the opponent to show cause:—We offer absolute and unqualified apology for our conduct. On the merits we submit that we have filed two affidavits which show that the facts were a little different from those mentioned in the affidavits in support of the application. We contend that the term "Misbehaviour" in section 56 of Regulation II of 1827 refers only to professional misconduct in Court.

M. B. Chaubal, Government Pleader, in person:—The opponent's conduct complained of is not only a misbehaviour, but it is a criminal offence, inasmuch as it constitutes a contempt of Court.

The fact that the opponent put up the resolution to the meeting is in itself evidence of misbehaviour.

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GOVERNMENT PLEADER v. JAGANNATH.

SCOTT, C. J.:—This matter comes before us on the petition of the Government Pleader which states :—

(1) That Mr. Jagannath Moreshvar Samant, B.A., LL.B., is a District Court Pleader, and practises in the Courts of the District and Sessions Judge of Sholápur and Courts subordinate thereto.

(2) That on the 30th July last a public meeting was held at Sholápur for the purpose of expressing sorrow for and sympathy with Mr. Tilak for the punishment awarded to him, at which nearly a thousand persons attended.

(3) That Mr. Jagannath Moreshvar Samant, Pleader above-named, presided at the said meeting and among other things spoke in favour of the 5th resolution passed on the occasion and was in the chair when the said resolution was put to the meeting. The said resolution was in the Maráthi language and was to the following effect:—"That this meeting contemptuously denounces the Honourable Mr. Justice Davar of the Bombay High Court, who at the time of announcing sentence made unchecked and unconnected and unmeaning assertions, which even the enemies of the respected Tilak would have been ashamed to make, and thereby branded our sorrow (sore hearts) ".

(4) Petitioner submits that such conduct at a Public Meeting in a Pleader in regard to a resolution contemptuously denouncing a Judge of the High Court in respect of his solemn duty as a presiding Judge is not only contempt of Court, but is further reprehensible as a misbehaviour falling within the purview of section 56 of Regulation II of 1827, and as such can and ought to be dealt with by this Honourable Court in its Disciplinary Jurisdiction.

The petition is supported by affidavits of Mr. Barve, Deputy Superintendent of Police and Mr. Dikshit, Sub-Inspector, Police, Sholápur.

In showing cause against the application two affidavits were made use of by counsel for Mr. Samant from which it appears that he did not speak on the 5th resolution beyond asking if there was any objection to it. The Police Officers depose to

words used by him defamatory of Mr. Justice Davar, but this is denied by Mr. Samant; we will therefore assume that they were not used.

It is admitted that Mr. Samant presided at the meeting, opened the proceedings with a speech and proposed the first two resolutions. He then called on other speakers to propose the other resolutions and took the sense of the meeting upon them. He attempts to excuse his conduct by pleading that he did not know exactly the terms of the fifth resolution until it was read out by the proposer. It is clear, however, that he not only listened to the speeches on the resolution and to the reading of the resolution without protest but also read out the resolution himself to the meeting and invited it to agree to the terms thereof.

We are of opinion that in so conducting himself at the meeting Mr. Samant was guilty of misbehaviour which renders him liable to suspension or removal from the roll of pleaders. Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice give them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt. Mr. Samant, who owes his position to a Sanad issued by this Court, has invited and procured the passing at a meeting of nearly a thousand people of a resolution contemptuously denouncing or protesting against the conduct of a Judge of this Court in passing sentence at a trial at the Criminal Sessions.

This conduct calls for more serious notice than a mere expression of disapproval. We suspend Mr. Samant from practice for six months. He must deliver up his Sanad to the District Judge or the Registrar of this Court and may apply for it again in six months' time.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1908. *November* 17.

SUNDRABAI SAHEB (ORIGINAL OPPONENT No. 8), APPELLANT, *v.* THE COLLECTOR OF BELGAUM (ORIGINAL PETITIONER), RESPONDENT.*

Practice—Taxation—Pleader's fees—Appeals in Probate Proceedings—Scale of costs—Act I of 1846, sec. 7.

The taxation of pleader's fees in appeals from probate proceedings, should, according to a long standing practice of the High Court of Bombay, be valued at Rs. 30.

APPEAL from an order passed by E. Clements, District Judge of Belgaum.

The Collector of Belgaum as executor of the will of one Lingappa Jayappa, applied to the District Court of Belgaum, for a probate of the will. In this proceeding, Sundrabai (widow of Lingappa) was joined as opponent No. 8. This Sundrabai was a minor; and the Deputy Názir was, therefore, appointed her guardian *ad litem*.

Against this order, Sundrabai, represented by one Dayagowda as her guardian, appealed to the High Court.

This appeal was dismissed by the High Court; and the respondent's costs were ordered to be paid by Dayagowda, the guardian of the minor.

In taxing the bill of costs, the office taxed the pleader's fees at Rs. 30, in obedience to a long standing practice in the High Court. The respondent's pleader objected to this taxation and contended that the pleader's fee should be assessed on one-fourth the amount of fees due on the whole subject-matter of the probate petition, *viz.*, Rs. 6,08,024 under the proviso to section 7 of Act I of 1846.

The Taxing Officer was of opinion that pleader's fee was rightly taxed at Rs. 30.

The respondent's pleader thereupon applied to the Court.

D. A. Khare for the appellant.

The Government Pleader for the respondent.

* First Appeal No. 26 of 1908.

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SUNDRABAI v. THE COLLECTOR OF BELGAUM.

CHANDAVARKAR, J. :—The question of law raised in this case by the learned Government Pleader relates to the valuation of Pleader's fees in proceedings for probate. The Collector of Belgaum having applied to the District Judge for probate in respect of the will of Lingappa Jayappa Sir Desai of Navalgund, caveats were entered by or on behalf of several persons, one of whom was the deceased's widow. As she was a minor, the Collector applied to the District Judge for the appointment of a guardian *ad litem*. The Judge having by an order appointed the Deputy Názir of his Court, an appeal was filed in this Court against that order by Dayagowda Leegowda Patil, who described himself as guardian of the minor. The appeal was heard and the order was confirmed with costs, which were directed to be paid by the guardian. The Registrar's office having valued the Pleader's fees at Rs. 30 as part of the costs, according to a long-standing practice of this Court, the learned Government Pleader, who had appeared in the appeal for the Collector of Belgaum, objected to the valuation, and contended before the Taxing Officer that the Pleader's fees should be calculated in accordance with the last clause of section 7 of Act I of 1846.

The point has been urged before us and its determination depends upon the question whether probate proceedings, both original and appeal, fall within the meaning of a "regular suit" so as to come within the purview of section 7 of Act I of 1846. The learned Government Pleader contends that they are and relies upon section 83 of the Probate Act (V of 1881). The language, however, of that section is far from lending support to the contention. The section does not say that proceedings for probate are "a regular suit" or that they shall be treated as such for all purposes. It provides that "they shall take as nearly as may be the form of a suit, according to the provisions of the Code of Civil Procedure." This would show that probate proceedings do not, under the ordinary law, fall within the description of a "regular suit"; it is by virtue of section 83 that they are brought within that category; and they are so brought, not in point of fact but only in point of *form*, for the limited purpose of applying to them "as nearly as may be" the provisions

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of the Code of Civil Procedure. These restrictions leave still a difference between "a regular suit" and a testamentary suit. That the Legislature intended the difference to exist is apparent from the special provisions in the Court Fees Act (VII of 1870) for the valuation of Court fee in the case of an application for probate, as distinguished from a suit. As section 83 of the Probate Act brings a probate proceeding within the description of a suit by means of a statutory fiction the purposes of which are expressly limited to the provisions of the Code of Civil Procedure, we think we should be extending the scope of that fiction beyond its legitimate limits if we were to allow the argument of the learned Government Pleader. We hold, therefore, that the long standing practice of the Court as regards the valuation of Pleader's fees in probate proceedings should continue.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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November 17.

AMARSANG MAVSANG (ORIGINAL DEFENDANT), APPELLANT, *v.* JETHALAL MAGANLAL AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Toda Giras Allowance Act (Bom. Act VII of 1887), section 5†—Toda Giras allowance—Attachment and sale of in execution of a decree—"Money likely to become due," interpretation—How far can the allowance be attached and sold.

The plaintiff, who held a money-decree against the defendant, applied for its execution by sale of the *toda giras* allowance which the latter was entitled to receive periodically from the Mámlatdár's Kacheri. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the defendant during the twenty years following the application. The lower Courts held that the defendant's life interest in the *toda*

* Second Appeal No. 599 of 1907.

† The section runs as follows:—

"No *toda giras* allowance shall be liable to attachment or sale in execution of a decree:

"Provided that any money due or likely to become due to a judgment-debtor on account of a *toda giras* allowance may be attached in execution of the decree against him, but such attachment shall not affect any money which becomes due on account of such allowance after such judgment-debtor's death."

giras allowance computed at its valuation for twenty years, could be attached and sold in execution of the decree:—

Held, reversing the order, that it is clear from the language of section 5 of the Toda Giras Allowance Act (Bombay Act VII of 1887) that it is not the life interest of the judgment-debtor in a *toda giras* allowance, but something short of it that is allowed by the Act to be attached.

The words "money likely to become due" in section 5 of the Act must be restricted to the case where, for instance, during the life-time of the judgment-debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment-debtor dies before that date; and to other cases of a similar character.

Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises.

APPEAL from the decision of A. C. Wild, District Judge of Ahmedabad, confirming the decree passed by B. J. Desai, Subordinate Judge at Kaira.

Proceedings in execution.

There was a money decree passed in favour of Jethalal Maganlal against Amarsang Mavsang. In execution of this decree, the decree-holder applied for attachment and sale of the *toda giras* allowance of Rs. 303 payable every year to the defendant from the Mámlatdár's Kacheri at Mehmadabad. The allowance sought to be attached was that which was to become payable to the defendant during the following twenty years.

The defendant contended that the *giras* allowance could not be attached and sold; that the allowance for twenty years which the decree-holder sought to attach and sell as a debt had not become due; that what was uncertain and dependent upon the pleasure of Government could not be attached and sold; and that the allowance was paid to him for his maintenance.

The Subordinate Judge overruled the defendant's contentions and allowed the execution to be proceeded with. His reasons were stated as follows:—

It appears that the allowance in question is of a nature of a *toda giras* allowance (see the copy of the agreement, condition 1). In the case of the *Secretary of State* v. *Khemchand*, I. L. R. 4 Bom. 432, it has been held that a *toda giras*

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hak is not exempted from attachment. Section 5 of Act VII of 1887 (Bombay) exempts the *toda giras* allowance from liability to attachment and sale in execution of a decree but provides that any money due or likely to be due to a judgment-debtor may be attached in execution of a decree against him. It is thus evident that the money likely to be due to the judgment-debtor is expressly declared liable to attachment. I am, therefore, of opinion that the decree-holders in this case have a right to proceed in execution against the moneys likely to be due to the judgment-debtor on account of the *toda giras* allowance.

On appeal this order was confirmed by the District Judge on the following grounds :—

A 'giras' allowance which is a vested right and only to be discontinued under certain conditions is not a merely contingent or possible right or interest and section 266 (*k*), Civil Procedure Code, and the definition of contingent interest to be found in section 21 of the Transfer of Property Act do not come in the decree-holder's way.

It is admitted by appellant's pleader that this is a *toda giras* allowance but the ruling in I. L. R. 4 Bom. 432 of 1880 that a *toda giras* allowance is not exempted from attachment is of a date prior to the enactment of Act VII of 1887. Section 5 of this Act shows that the whole allowance is not attachable, but the proviso to the section permits cash payments likely to be due to the judgment-debtor until his death to be attached. Accordingly the 20 annual cash payments which will certainly be paid to judgment-debtor unless he first dies may be attached by the decree-holder.

In Government Resolution No. 3436 of 5th April 1906 the Legal Remembrancer expresses the opinion that the sale of a giras allowance for some years in execution of a decree is allowable under sections 268 and 284, Civil Procedure Code, but it is argued that a debt to be attached under that section must be one that is actually due not, as here one that became due from year to year. Here reference is made to I. L. R. 27 Cal. 38 and 14 Moore's Indian Appeals 40. In the first of these rulings it is laid down that the debt must be an actually existing debt not merely money that may or may not become payable at some future time ; in the second it is held that the sum attached must not be inchoate but existing and definite. The liability of Government to pay the giras allowance is an existing liability though the allowance is to be paid in the future and annually. There is no uncertainty about the payment, and I, therefore, hold that the allowance comes within the definition of debt in Civil Procedure Code, section 266, and may be attached under section 268, Civil Procedure Code.

It is urged that to allow the sale of the allowance would be contrary to public policy as it is given to its recipient for services to be rendered to Government in keeping the peace and preserving order. It would appear however that the allowance is of the nature of compensation to free-booters for the loss of the black-mail which they used to levy, *vide* I. L. R. 4 Bom. 432. The

girasia in the sanads exhibits 13 and 14 binds himself not to plunder, and to serve Government if called upon. I understand however that no service is now required from the holders of giras allowances, and they certainly in no case will be allowed to plunder. It will therefore not be impossible to permit the present allowance to be attached.

The judgment-debtor appealed to the High Court.

T. R. Desai for the appellant:—A *toda giras* allowance is payable on certain conditions according to the terms of the sanad conferring it. The Government have always a right to demand services from the grantee. It can be revoked at any time: it is not certain and definite and the continuance of the allowance in future is not a matter of right. It is not a debt within the meaning of section 266 of the Civil Procedure Code; and so the amount that will accrue due during the next twenty years cannot be attached and sold. Refers to *Haridas Acharjia* v. *Baroda Kishore Acharjia*[1]; and *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*[2].

Section 5 of the Toda Giras Allowances Act (Bombay Act VII of 1887) expressly excludes the right from attachment and sale. There may be attachment of what is actually due: but what is yet to become due in the future cannot be attached. The words "likely to become due" in the section should be strictly construed having regard to the nature of the allowance and the policy of the statute.

V. G. Ajinkya for the respondent:—The right to receive allowance is a right pertaining to the judgment-debtors. It is definite and regularly payable. The right is not within the proviso of section 5 of the Toda Giras Allowances Act (Bombay Act VII of 1887).

CHANDAVARKAR, J.:—The respondents, having obtained a decree for money against the appellant, applied for its execution by sale of the *toda giras* allowance which the appellant was entitled to receive periodically from the Mámlatdár's Kacheri at Mehmadabad. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the appellant during the twenty years following the application.

(1) (1899) 27 Cal. 38. (2) (1871) 14 Moo. I. A. 40.

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The appellant resisted the prayer upon the ground that the allowance could not be attached and sold, whether under section 266 of the Code of Civil Procedure or under section 5 of Bombay Act No. VII of 1887. This objection to the attachment and sale has been disallowed by both the Courts below.

Section 5 of Bombay Act VII of 1887 enacts that "no *toda giras* allowance shall be liable to attachment or sale in execution of a decree, provided that any money due or likely to become due to a judgment-debtor on account of a *toda giras* allowance may be attached in execution of the decree against him, but such attachment shall not affect any money which becomes due on account of such allowance after such judgment-debtor's death." The words "likely to become due" in this section have been construed by both the lower Courts to apply to the life-interest of the holder of a *toda giras* allowance. Accordingly they have held that such life-interest, computed at its valuation for 20 years, can be attached and sold in execution of a decree against the holder.

The difficulty in accepting this view of the lower Courts lies in the difference in point of language between section 5 and the preceding section. The latter (section 4 of the Act) provides that "no mortgage, charge or alienation of a *toda giras* allowance, or of any part thereof, or of any interest therein, by any recipient of the same, shall be valid as to any time beyond such recipient's natural life." That is, a private alienation by the recipient shall be valid to the extent of his life-interest but not beyond it. If the Legislature had intended the same to be the case as regards an alienation by way of attachment and sale in execution of a decree, similar phraseology would have been used in section 5. Nothing could have been simpler in that case than for the Legislature to have said in section 5 that such attachment and sale shall not be valid beyond the natural life of the holder of the allowance. But so far from using any such language, which would have been apt to show that that was their intention, the Legislature have used language in the enacting part of section 5 which prohibits in absolute terms the attachment and sale of a *toda giras* allowance in execution of a decree; and then in the proviso which follows they make an exception in the case of

"moneys due or likely to become due" to the judgment-debtor. But even as to such moneys the proviso says that the right to attach and sell in execution of a decree shall fail if they become due on account of such allowance "after such judgment-debtor's death." The meaning of this is obvious. Suppose, to take one of several cases that might be put in illustration, during the life-time of the judgment-debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction; the judgment-debter, however, dies before that date. Now, under the ordinary law, notwithstanding the death, when the date fixed for payment arrives, the money would become payable to the estate of the deceased as part of his assets, and it could be attached in execution of a decree against him, as a portion of his life-interest in the allowance. But the proviso to section 5 alters the ordinary law and provides that even in such a case there shall be no attachment.

It seems clear from this language of section 5 that it is not the life-interest of the judgment-debtor in a *toda giras* allowance but something short of it that is allowed by the Act to be attached. The words "money likely to become due" must, therefore, be restricted to such a case as the one we have mentioned above in illustration and other cases of a similar character. Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises.

For these reasons we must reverse the decree appealed from and remit the present darkhást for disposal according to law with reference to the foregoing observations. Costs to abide the result.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1908.
November 23.

SUBRAYA VITHAL NAIK (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* NAGAPPA SUBBAYA SHANBHOG AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 2 TO 4), RESPONDENTS.*

Hindu law—Debts—Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Civil Procedure Code (Act XIV of 1882), section 276.

When the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under section 276 of the Code of Civil Procedure, his father is deprived of the power of alienation of that interest in satisfaction of his own debts.

SECOND appeal from the decision of C. C. Boyd, District Judge of Kánara, amending the decree passed by K. R. Natu, Subordinate Judge at Kumta.

One Anant Subbaya (defendant No. 2) and his two sons Martu and Anant (defendants Nos. 3 and 4) together constituted a joint Hindu family, which owned an ancestral shop.

A money decree was passed against Waman in a matter which concerned him. In execution of this decree Waman's share in the shop was attached on the 8th March 1900 and it was subsequently sold to the plaintiff at a Court sale on the 18th October 1900.

Meanwhile on the 20th August 1900, Waman's father Anant (defendant No. 2) sold the whole shop to Subbaya (defendant No. 1) in satisfaction of a family debt of Rs. 700.

The plaintiff brought the present suit for recovering, by partition, Waman's one-third share in the family shop.

In the first Court, the plaintiff's claim was decreed. The reasons were as follows:—

"The attachment of Waman's one-third share in the shop and its site took place in Darkhást No. 454 of 1899 on the 8th March 1900. The sale to defendant 1 took place on the 20th August 1900. It is not denied and does also appear from the deposition of defendant 2 that the shop and its site form part

* Second Appeal No. 835 of 1907.

of the ancestral property of defendants 2 to 4. Hence evidently defendant 4 had a third share in it. The sale to defendant 1 of the attached third share in the shop is illegal under section 276 of the Civil Procedure Code (*vide* I. L. R. 30 Bom. 337) . . . The sale in respect of the third share of Waman is illegal under the abovementioned section 276 although the Court sale took place on the 18th October 1900 the attachment was effected on the 8th March 1900. Plaintiff Nagappa's claim is *enforceable under the attachment* as provided in section 276."

On appeal this decree was confirmed by the District Judge with a slight variation.

There was an appeal to the High Court.

Nilkantha Atmaram for the appellant :—The provisions of section 276 of the Civil Procedure Code (Act XIV of 1882) do not apply to the sale by the father. The section must be read with section 274 of the Code which expressly prohibits alienations only by the judgment-debtor and forbids any persons from taking transfer from the judgment-debtor. Here the alienor is not the judgment-debtor; and therefore the sale is not affected by section 276.

Further, the father's power of alienation is independent of the sons. In the case of *Mussamut Nanomi Babuasin* v. *Modun Mohun*[1], their Lordships of the Judicial Committee hold that as a matter of fact the son's vested right by birth is destroyed by the obligation upon him to pay the father's debts.

S. S. Patkar for respondent No. 1 :—The son's share in the house was admittedly under attachment at the date of the sale of the whole to the appellant by the father. The effect of the attachment was to arrest the power of the father to make any alienation of it: see *Madho Parshad* v. *Mehrban Singh*[2]. The father's power of alienation is not independent of the son. He cannot alienate it without the authority of the son either express or implied. When the share is once attached, the son himself cannot alienate it much less could the father do so. The attachment constitutes a valid charge on the land: see *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[3]. It prevents even the right of survivorship in the joint family. The attachment under section 276 like the rule of *lis pendens* makes the alienation subservient to the

(1) (1885) L. R. 13 I. A. 1. (2) (189[illegible] L. R. 17 I. A. 194, pp. 196-197.
(3) (1878) L. R. 6 I. A. [illegible]

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rights of the attaching creditor. The alienation is void as against all claims enforceable under the attachment.

Sumitra S. Hattiangdi for respondent No. 2.

CHANDAVARKAR, J. :—Under the Hindu law a father has the right to sell or mortgage ancestral property, including the interests therein of his sons, in satisfaction of his antecedent debts, provided those debts were not contracted for immoral or illegal purposes. This right to dispose of the ancestral property so as to include and affect the shares of the sons arises, according to Hindu law, in virtue of the pious obligation of the sons to pay the debts of the father, which were not illegal or immoral. In other words, when the father alienates the property, he exercises the power of alienation which the sons would have exercised in discharge of their pious duty which they owed to him : he is virtually alienating the property for them and on their behalf in discharge of their duty in accordance with the power given to him by Hindu law. When once this principle of Hindu law is grasped, it follows that when the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under section 276 of the Code of Civil Procedure, his father is deprived of the power of alienation of that interest in satisfaction of his own debts. And that is so, because, the son's power of alienation having been taken away by the Court, there is no power left in him on which the father's power could rest after the Court's order. For these reasons we think the lower Court is right and its decree is confirmed with costs.

Decree confirmed.

F. E.

ORIGINAL CIVIL.

Before Mr. Justice Knight.

SHIVAJIRAO MADHAVRAO AND ANOTHER, PLAINTIFFS, *v.* VASANTRAO MADHAVRAO, DEFENDANT.*

1903. *July* 20.

Hindu Law—Joint Hindu family—Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers.

M., a member of a joint Hindu family, being involved in debt, gave a release of his share to his father in consideration amongst other things of a sum of Rs. 5,000. At the time of this release M. had one son living. On this son suing the co-parcenary for partition it was held (in Suit No. 423 of 1901) that he was entitled to a share in the joint family property and that the release acted only against his father personally. After the date of this decree M. had another son born who sued the first son to recover from him a moiety of the sum allotted to the first son on partition.

Held, that the second son was not entitled to any share in the property.

One Vithoba Mankojee, a Hindu inhabitant of Bombay, and the great-grandfather of the first plaintiff and of the defendant, herein acquired considerable moveable and immoveable property under the will and codicil of his grandfather Kashinath Bhikhaji. This said will and codicil were afterwards held void and inoperative as dealing with property which was ancestral in the hands of Kashinath Bhikhaji.

Vithoba Mankoji died on the 22nd of April 1873 leaving him surviving one son Kashinath Vithoba and two grandsons Ganpatrao Kashinath and Madhavrao Kashinath. The said Kashinath and his said son and grandsons contracted to live together after the death of the said Vithoba as an united Hindu family joint in food, worship and estate. The first plaintiff and the defendant are the sons of the said Madhavrao Kashinath. The defendant was born in 1884. Kashinath Vithoba died on the 23rd June 1901.

On the 20th January 1889 Madhavrao Kashinath became involved in debt and in consideration of his father paying the sum of Rs. 5,000 in settling his debts and for various other

* Suit No. 424 of 1902.

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considerations executed a release of all his interest in the family property in favour of his father. Ultimately Madhavrao Kashinath became insolvent in or about the year 1892 and by virtue of the vesting order under section 7 of the Insolvent Act all his estate became vested in the Official Assignee.

In 1901, Vasantrao Madhavrao, the defendant herein, filed a suit in the High Court of Judicature at Bombay, being Suit No. 423 of 1901, for partition of certain joint and ancestral properties. The Appeal Court at Bombay reversing the decision of Tyabji, J., held that the properties were joint and ancestral and that the said Vasantrao Madhavrao was entitled to a half share therein.

The Appeal Court further remarked "Madhavrao has released his share and in answer to an enquiry from the Court it was stated that neither he nor his assignee in insolvency questions the release as against himself. But it follows that the release must be treated not as for the benefit of Kashinath alone but of the co-parcenary and so the shares must be determined as though Madhavrao was dead."

The Privy Council confirmed the decree of the Appellate Court on the 8th February 1907.

After the date of the decree of the Appellate Court and pending the appeal to the Privy Council the first plaintiff was born to the said Madhavrao on the 8th May 1905, and in this suit claims a share in the moiety of the properties to which the defendant has been declared entitled.

By a consent Judge's order dated the 11th April 1908 the suit was directed to be set down for trial of the following preliminary issue:—

"Whether the first plaintiff is entitled to any and what interest in the defendant's share of the properties to which he is declared entitled in Suit No. 423 of 1901 in the plaint mentioned."

Padsha and *Dastur*, for the plaintiff:—There has been no partition of the joint family property before the birth of the plaintiff. In 1889 all that happened was that the father retired

from the family. It was a personal relinquishment. The rest of the family was joint, that is why Vasantrao was allowed one half and not one quarter. The Appeal Court declares the release is for the benefit of the whole family, yet it has operated solely for the benefit of Vasantrao. In effect it is a gift by the father to his son and that with the consent of the co-parceners. Viewed in that light the case nearly approaches *Rai Bishen Chand* v. *Mussumat Asmaida Koer*[1] and so long as the father has not kept enough to give an afterborn son as much as the earlier born sons received, an equal share must be made good to the afterborn son by the brothers: *Krishna* v. *Sami*[2], *Chengama Nayudu* v. *Munisami Nayudu*[3].

Where the father leaves nothing to himself and the afterborn son has no source from which to maintain himself he can claim from the separated brothers a share equal to theirs.

Our second point is that the judgment of the Privy Council says that the release enures for the benefit of the other branch. The judgment treats Madhavrao as civilly dead but this does not break up the coparcenary. Madhavrao is personally disqualified by the release but this does not prevent the son of a disqualified person from inheriting property. The afterborn son is in the same position as his brothers.

Sethna (with *Setalvad*), for defendant:—*Krishna* v. *Sami*[2] has not been followed in Bombay. See *Bapuji* v. *Pandurang*[4], *Balkrishna Trimbak Tendulkar* v. *Savitribai*[5], *Bailur Krishna Rau* v. *Lakshmana Shanbhogue*[6], *Nawal Singh* v. *Bhagwan Singh*[7], Vir-Mitrodaya, p. 492.

KNIGHT, J.:—This suit is a pendent to the case of *Wasantrao* v. *Anandrao*[8] decided by the Appellate Court in September 1904, and subsequently by the Privy Council[9].

(1) (1884) L. R. 11 I. A. 164.
(2) (1885) 9 Mad. 64.
(3) (1896) 20 Mad. 75.
(4) (1882) 6 Bom. 616.
(5) (1878) 3 Bom. 54.
(6) (1881) 4 Mad. 302.
(7) (1882) 4 All. 427.
(8) (1904) 6 Bom. L. R. 925.
(9) (1907) 9 Bom. L. R. 595.

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The facts of the case, so far as they concern the question now before me, are the following :—In 1889 there was a joint Hindu family consisting of one Kashinath, his two sons Ganpatrao and Madhavrao, Ganpatrao's six sons and Madhavrao's only son Vasantrao. This family was possessed of considerable ancestral property. In January 1889, Vasantrao being then some five years of age, Madhavrao found himself heavily involved in debt; and in consideration of his father's Kashinath paying Rs. 5,000 "in settling the debts and for various other considerations," Madhavrao executed a deed of release in his favour relinquishing all interest in the family property.

In 1901 Vasantrao instituted a suit against Ganpatrao's sons (Ganpatrao and Kashinath both being dead) to obtain a share in the ancestral property. Among the various grounds raised by the then defendants, I need only refer to the contention that by the release Madhavrao forfeited not only his own interest in the ancestral property but that of his descendants. It was held, however, and the Privy Council confirmed the finding, that the release operated to extinguish only Madhavrao's own personal interest and did not bind his son, and that it must be treated as enuring, not as for the benefit of Kashinath alone, but for that of the whole coparcenary. Vasantrao, therefore, as representing one of the two sons of Kashinath, was held entitled on partition to a half share of the property, Ganpatrao's children taking the other half.

Now the present plaintiff is a second son of Madhavrao's, born in 1905, nearly a year after the decree for partition, and more than sixteen years after the date of the release. He sues his brother Vasantrao for a moiety of the ancestral property that has fallen to the latter's share, and the preliminary issue has been raised whether he is at all entitled to participate in the property.

The answer to this question must in the main depend on the determination of Madhavrao's precise position. He is still alive, he claims no further share in the property himself, nor was any claimed on his behalf by the Official Assignee who represented him in the previous suit. The only direct allusion

to his status made in the judgment of the Appeal Court is in a passage towards the end, where it is said that "the shares must be determined as though Madhavrao were dead"; but this, although clear and adequate for the purposes of that judgment, is of little present assistance. The learned counsel for the plaintiff however sought to make it the basis of an argument that Madhavrao must be regarded merely as one civilly dead, as if he had turned to the ascetic life, or at the most as one disqualified from sharing in the family estate. But this supposition is not in accord with the facts and it needs but few words to demonstrate its impropriety. Hindu law bases exclusion from parti cipation on certain clear and well-defined grounds, none of which can be applied to Madhavrao either literally or metapho rically. He is not afflicted with insanity or other congenital infirmity, and it is not pretended that he has "assumed another order." Whatever be the true history of the transactions culminating in the release of 1889, the facts accepted by the parties in the present suit are these, that Madhavrao received Rs. 5,000 from his father, directly or indirectly, and that he thereon resigned all his interest in the ancestral estate. No doubt this sum seems exiguous in comparison to the three-quarters of a lákh to which he was then apparently entitled, but small as it was, he accepted it in satisfaction of his claims, and he has never sought to recede from the arrangement. I can only look upon him, therefore, as a coparcener who has elected to take his portion and recede from the family and it is thus as I understand that he was regarded in the earlier suit.

The question then resolves itself into this: what are the rights as against the joint family of the son of a separated coparcener born subsequent to his father's separation? So stated, the question bears its answer upon its face: there is no known rule or principle which can entitle such a son to claim aught from the coparcenary. Vasantrao's example affords plaintiff no assistance. He was alive when his father executed the release, and the latter was powerless to divest him of rights already vested in him. But the plaintiff stands in entirely different

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case; he was not even *en ventere sa mere* when his father quitted the family. The various authorities cited by his learned counsel —I may more particularly instance *Ganpat* v. *Gopalrao*[1], *Rai Bishen Chand* v. *Mussumat Asmaida Koer*[2], and *Chengama Nayudu* v. *Munisami Nayudu*[3]—amount to no more than this: that where there has been a partition between a father and his sons, an afterborn son may claim a share from his brothers, if his father reserved no property for himself or is unable to provide for him. The Madras case bears a bastard resemblance to that now before me, in that Madhavrao is destitute of means and unable to provide for the plaintiff; but there the similarity ceases. These cases proceed upon the special principle of Hindu Law that the unborn son cannot be deprived of his share in the paternal estate by a prior partition. "Sons with whom the father has made a partition shall give a share to another son who is born after it" (Vishnu, 2 Colebrooke, II, 268). But the application of this principle is expressly limited to the case of partition between sons and father, and there is no warrant for its extension to a son born to a separated coparcener, other than the father of the family, after partition. Indeed, it is only necessary to reflect upon the confusion that such an extension of the principle would entail, to realize its impracticability.

There is little need to reinforce the argument. The texts of Vishnu and Yajnavalkya which direct separated brothers to cede a share to the afterborn brother have been explained by the commentators as applicable only to posthumous sons (*Ganpat* v. *Gopalrao*[1]), and even this direction is restricted, it would seem, to the case of the son *en ventre sa mere* at the date of the partition (Mayne, section 472, 7th edn.). Relatively to the head of the family with whom Madhavrao effected partition, plaintiff is not a son but a grandson; he was not *en ventre sa mere* at the date of the partition, and he was not posthumously born. The circumstances that the father has dissipated the small patrimony that he received and is now unable to provide for him is an accident that does not bear upon the argument.

(1) (1899) 23 Bom. 636. (2) (1884) L. R. 11 I. A. 164: 6 All. 560.
(3) (1896) 20 Mad. 75.

I, therefore, decide that plaintiff is not entitled to claim a share of the property in suit.

Attorneys for the plaintiff:—*Messrs. Jehangir, Gulabbhai and Billimoria.*

Attorneys for the defendant:—*Messrs. Bicknell, Merwanji and Romer.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

SIR JEHANGIR COWASJI JEHANGIR (PLAINTIFF) *v.* THE HOPE MILLS, LIMITED (DEFENDANTS).*

1908. *September* 19.

Decree—Execution—Civil Procedure Code (Act XIV of 1882), sec. 244—Transfer of Property Act (IV of 1882), sec. 93.

An application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution.

Where a decree *nisi* contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree.

Ajudhia Pershad v. *Baldeo Singh*(1) and *Nandram* v. *Babaji*(2), followed.

PROCEEDINGS IN CHAMBERS.

The plaintiff, a mortgagee in possession of the property belonging to the defendants, instituted this suit to recover the money due to him under his mortgage and prayed that in default of payment the right to redeem might be foreclosed or the mortgaged premises sold. After the mortgage the plaintiff had entered into an agreement with the defendants under which they could work the Mills.

* Suit No. 490 of 1903.

(1) (1894) 21 Cal. 818. (2) (1897) 22 Bom. 771.

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On 26th January 1904 the plaintiff obtained a decree which was defective because *inter alia* there was no reference to the Commissioner and no direction whatever for taking accounts although the decree contemplated an account.

On 9th August 1904 the plaintiff applied for a decree for foreclosure or sale which was refused on the ground that the exact amount due to him was not ascertained.

On the 19th October 1907 the defendants' agents obtained a rule *nisi* calling upon the plaintiff to show cause why he should not pass his accounts as first mortgagee in possession of the defendants' property before the Commissioner for taking accounts.

The rule came on for argument before Davar, J., on 21st November 1907 who made it absolute[1] ordering the plaintiff to pass his accounts before the Commissioner. On appeal this order was set aside[2] by the Appeal Court on 3rd March 1908.

On the 15th August 1908 the defendants issued a notice to the plaintiff on the following terms :—

"Take notice that you are hereby required under section 244 of the Code of Civil Procedure to appear in person or by Advocate or Attorney of this Court before the sitting Judge in Chambers on the 29th day of August 1908 at 11-15 in the forenoon, to show cause why you should not render an account of moneys due and payable to you under the decree *nisi* passed herein on the 26th day of January 1904 less the value of the stock and stores in hand or the sale-proceeds thereof and any sum that may be found on account to be in your hands as first mortgagee in possession after deducting from such value or sale-proceeds all such charges, expenses and emoluments that you may be entitled to with respect to the mortgaged premises and the working thereof and execute a reconveyance of the mortgaged premises in Schedule A to the said decree *nisi* specified in favour of the 1st defendant Company on making payment of the said amount or such further or other order should not be made or directions given as to this Honourable Court may seem proper under section 244 of the Civil Procedure Code and if need be but not otherwise why issues should not be tried as to the first defendant Company's right thereto and heard along with Suit No. 650 of 1908."

The notice came on for argument on 5th September 1908.

Kirkpatrick with *Setalvad* for defendants.

(1) See 9 Bom. L. R. 1380.

(2) See *ante* p. 216.

Robertson, Advocate-General, with *Coyaji* for plaintiff:—Our first preliminary objection is that no notice has been given to us as provided by section 248 of the Civil Procedure Code.

PER CURIAM.—This point was not taken on the last occasion when the plaintiff applied for a week's adjournment and being a purely technical objection may be taken to have been waived.

Robertson:—Our second preliminary objection is that the decree in this case cannot be executed under section 244 of the Civil Procedure Code as it is a decree *nisi*.

Our third preliminary objection is that the defendants cannot apply for execution of this decree. No relief has been granted him against anyone. If he claims any relief he must apply to the Court under the Transfer of Property Act.

Kirkpatrick:—In reply to the second objection the plaintiff would remain in possession till the year 1916 and then the defendant could not redeem him.

As to the second objection we say the decree directs the plaintiff to reconvey the property and that is precisely what we ask for here.

We ask to be allowed to raise issues in this matter now.

Robertson:—This application has been misconceived. We refer to *Ajudhia Pershad* v. *Baldeo Singh*[1], *Nandram* v. *Babaji*[2], *Akikunnissa Bibee* v. *Roop Lal Das*[3], *Tara Pado Ghose* v. *Kamini Dassi*[4], and sections 88, 89 and 91 of the Transfer of Property Act.

Kirkpatrick:—We submit our procedure in this case is the only one we could adopt. Execution only means enforcement of a decree; the Code defines a decree in section 2. This would include a decree *nisi*. Section 235 of the Code speaks of decrees generally. *Cf.* sections 260, 261 of the Code and Rule 75 of the High Court Rules. We refer to *Karim Mahomed Jamal* v *Rajooma*[5]. We have now served the plaintiff with notice under section 248 of the Code.

(1) (1894) 21 Cal. 818.
(2) (1897) 22 Bom. 771.
(3) (1897) 25 Cal. 132.
(4) (1901) 29 Cal. 644.
(5) (1887) 12 Bom. 174.

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Robertson :—It is now suggested for the first time that this matter may be treated as a motion in Court under the Transfer of Property Act. This cannot be done.

[MACLEOD, J :—Mr. Kirkpatrick you might move under section 76 of the Transfer of Property Act.]

Kirkpatrick :—We desire such accounts taken as would enable us to proceed with the decree.

Robertson :—We submit that to allow the defendants that relief would be to reverse the decision of the Appeal Court and this Court cannot in these proceedings rectify the decree of the Appeal Court. The case of *Karim Mahomed Jamal* v. *Rajooma*[1] might have been cited to the Appeal Court but it has no relevancy here.

MACLEOD, J. :—This is an application by the first defendant Company for the execution of a decree *nisi*, dated the 26th January 1904, passed in this suit which was brought by the plaintiff as first mortgagee of the defendant Company. Under that decree it was ordered that upon the defendants or any of them paying into Court on behalf of the plaintiff, etc.

There was no provision made in the decree for the way in which the account contemplated should be taken. On the 3rd December 1907 an order [2] was made by Mr. Justice Davar on a rule taken out by the defendant Company that the plaintiff should pass his accounts as first mortgagee in possession and having regard to all the directions in the decree before the Commissioner and the Commissioner was directed to take such accounts. This order was not to be enforced for two months and if the plaintiff within that time filed a suit to establish an agreement made by him with the defendant Company on the 3rd October 1905 the order was to be suspended until that suit was determined. This order was reversed by the Appeal Court[3] on the 3rd March 1908. The defendant Company now say that they are anxious to redeem the plaintiff-mortgagee but they cannot ascertain what amount should be paid into Court to

(1) (1887) 12 Bom. 174. (2) (1907) 9 Bom. L. R. 38).

(3) See *ante* p. 216: 10 Bom. L. R. 488.

enable them to get a reconveyance of the mortgaged property. They are ready to pay into Court any ascertained sum. A mortgagor in such a position demands the sympathy of a Court of Equity. Unfortunately for the defendant Company the Court of Appeal has decided that the omission in the decree to provide how the account should be taken was intentional and that the decree left it open to the parties to have the account taken and settled privately by some person of their nomination. Further it appeared to the Appeal Court that an account had been taken by a person appointed jointly by the parties with the result that a certain sum had been found due by the defendant Company to the plaintiff.

Under these circumstances I am asked by the defendant Company in execution proceedings to make an order calling upon the plaintiff to render an account of moneys due and payable to him under the decree *nisi* passed herein, and to execute a reconveyance of the mortgaged premises in the said decree in favour of the defendant Company on making payment of the said amount. The question at once arises whether there is a decree which can be executed. It has been held that an application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and that until a decree *nisi* is made absolute there is no decree capable of execution: *Ajudhia Pershad* v. *Baldeo Singh*[1] referred to in *Nandram* v. *Babaji*[2]. But it is argued that a decree directing accounts to be taken is a decree under section 2 of the Civil Procedure Code and can therefore be executed. The answer to that is that this decree *nisi* does not direct accounts to be taken. While it contemplated an account being taken it was silent on the question how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction. I am asked now in execution-proceedings to order the plaintiff to do something which he is not directed to do by the decree. That would be out of the question under any circumstances. There is nothing whatever in the decree *nisi* which is capable

(1) (1894) 21 Cal. 818. (2) (1897) 22 Bom. 771.

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of execution and the application must be dismissed with costs. Counsel certified.

Application dismissed.

Attorneys for plaintiff:—*Messrs. Bhaishanker, Kanga and Girdharlal.*

Attorneys for defendant:—*Messrs. Mulla and Mulla.*

W. L. W.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

1908. *November* 11.

MADHUSUDAN PARVAT STYLING HIMSELF SHANKARACHARYA OF DHOLKA (ORIGINAL DEFENDANT), APPELLANT, *v.* SHRI SHANKARACHARYA SWAMI OF SHARADA MATH (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 11—Shankaracharya of Sharada Math, plaintiff—Shankaracharya of Dholka, defendant—Dispute as to precedence or privilege between purely religious functionaries—Jurisdiction of Civil Courts.

The plaintiff, Shankaracharya of the Sharada Math at Dwarka in Gujarath, sued the defendant, Shankaracharya of the Jyotir Math at Dholka in the same province for (1) a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya and that he was not entitled to call for or receive any offerings from the people in Gujarath in his assumed capacity of a Shankaracharya of the Jyotir Math or a branch of that Math; (2) for an account of the money received by the defendant as a Shankaracharya in Gujarath with a decree for payment to the plaintiff of the sum found to have been so received by the defendant; and (3) for an injunction restraining the defendant from styling himself a Shankaracharya in Gujarath and from claiming and receiving offerings in Gujarath as Shankaracharya of the Jyotir Math or a branch of that Math.

The lower Court made a declaration that the defendant was not entitled to call himself a Shankaracharya of the Jyotir Math or of a branch of it at Dholka and an injunction against the defendant so styling himself and claiming or receiving offerings. The claim for an account and recovery of offerings received by the defendant was not allowed as the offerings might or might not have been made to the plaintiff.

On appeal by the defendant,

* First Appeal No. 45 of 1907.

Held, dismissing the suit, that to decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts, nor will they grant injunctions to prevent preachers from preaching where they like under any title they please provided no office or property is disturbed or interfered with.

For interference with mere dignity no suit can be maintained.

For voluntary offerings received no suit will lie.

Sri Sunkur Bharti Swami v. *Sidha Lingayah Charanti*(1), *Sangapa* v. *Gangapa*(2), and *Rama* v. *Shivram* (3), referred to.

Boyter v. *Dodsworth*(4), followed.

FIRST appeal against the decision of Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad, in Suit No. 640 of 1901.

The plaintiff, a Shankaracharya of the Sharada Math at Dwarka in Gujarath, sued (1) for a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya and that he was not entitled to call for or receive any offerings from the people of Ahmedabad and other places in Gujarath either in his assumed capacity of a Shankaracharya or of Shankaracharya of the Jyotir Math or of a branch of the Jyotir Math at Badrinath; (2) for a true and correct account of the proceeds that the defendant might have received during his sojourn at places mentioned in the plaint by virtue of his assumed capacity of a Shankaracharya; and (3) for a perpetual injunction restraining the defendant from styling himself a Shankaracharya in Gujarath as also from claiming or receiving offerings from the people of Ahmedabad and other places in Gujarath as a Shankaracharya or as a Shankaracharya of the Jyotir Math, or of a branch of the Jyotir Math of Badrinath.

The plaintiff alleged that he was the present occupant of the *Gadi* (seat) of Shri Shankaracharya at Dwarka in Gujarath called the Sharada Math, which was one of the four sees originally established in four directions by the well known and illustrious Shankaracharya, the restorer of the Vedic religion on the Advaita system of philosophy. The four sees so established were styled (1) the Jyotir Math, (2) the Govardhan Math,

(1) (1843) 3 Moo. I. A. 198.
(2) (1878) 2 Bom. 476.
(3) (1882) 6 Bom. 116.
(4) (1796) 6 T. R. 681.

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(3) the Sharada Math, and (4) the Shringeri Math. The first was situate in the Himalayas in Northern India, the second at Puri in Cuttack in Eastern India, the third at Dwarka in Western India, and the fourth at Shringeri in Southern India. Each of the said four Maths was given exclusive jurisdiction over the provinces surrounding it and the Shankaracharya of the respective Maths was enjoined to minister to the spiritual, theological, religious and social wants of the congregations within his jurisdiction and he was invested with the exclusive right to the status, style and position of a Shankaracharya as also the right as such to call for and receive pecuniary and other offerings from the people under his charge. The plaintiff duly and lawfully succeeded to the *Gadi* of the Sharada Math at Dwarka in 1901 and thus he became entitled to and had been in enjoyment of the said status, style and position of a Shankaracharya and to all the rights, titles, privileges and dignities as aforesaid appurtenant to the *Gadi* of the Sharada Math which possessed exclusive jurisdiction over Cutch, Kathiawar, Gujarath and other districts in Western India. The line of succession to the *Gadi* of Shankaracharya of the Jyotir Math at Badrinath had long become extinct and it was universally recognized that any lawfully constituted Shankaracharya of that Math was not in existence. Notwithstanding this circumstance the defendant fraudulently assumed the title of Shankaracharya and was falsely alleging that his so-called Math at Dholka was a branch of the Jyotir Math at Badrinath. Under his assumed title he called for and received pecuniary and other offerings from people at several places in Gujarath which was exclusively within the jurisdiction of the plaintiff to the serious detriment of the plaintiff's revenue and in derogation of his status, style and dignity as Shankaracharya and as occupant of the *Gadi* of the Sharada Math. The defendant was repeatedly warned to desist from arrogating to himself the title of Shankaracharya of the Jyotir Math or a branch of that Math in Umreth, Dholka, Nadiad, Matar, Mehmadabad, Sarkhej, Ahmedabad and other places in Gujarath and from collecting offerings from the people at said places but he failed to do so and his failure gave to the plaintiff the cause of action for the suit.

The defendant denied the plaintiff's status as Shankaracharya of the Sharada Math and contended that the plaintiff had no right to the style, position and dignities of a Shankaracharya and was therefore not entitled to the injunction sought for against the defendant, that the plaintiff's suit for the establishment of his right to the mere enjoyment of the dignities and position of a Shankaracharya was unsustainable in law, that the plaintiff's prayer that the defendant should be enjoined not to receive offerings from the people of Gujarath could not be entertained because the whole of Gujarath was not within the jurisdiction of the Court, that the Sharada Math and the Jyotir Math were two different Maths, there was no relation between them and it was not pretended that there was any other Shankaracharya of the latter Math, that the plaintiff was not entitled to call for an account of the voluntary offerings made to him as Shankaracharya of the Jyotir Math, that centuries ago, disputes having arisen between a former Shankaracharya of the Jyotir Math at Badrinath and the ruling authorities of that place, the then Shankaracharya left the Math enjoining his disciples not to reside in that Math thereafter, therefore the Shankaracharyas of that Math did not thereafter permanently live in the Math but they went about in Gujarath and other parts of India for the purpose of imparting religious instruction and the people believed that they were Shankaracharyas of that Math, that the Math was therefore not extinct and the ascendant preceptors of the defendant were always treated and respected as Shankaracharyas of the Jyotir Math and they established branches of that Math at several places in Gujarath, that the defendant and his preceptors were acknowledged as Shankaracharyas by several ruling Chiefs in Gujarath and even by the British Government which gave them licenses to carry arms, that the defendant and his preceptors had been preaching in Gujarath and other places and had been receiving offerings from the residents of those places for several years without any objection on the part of the plaintiff and his predecessors and so the plaintiff's claim was time-barred, that the territorial limits of the Maths being not fixed, the plaintiff was not entitled to claim exclusive jurisdiction to preach and collect offerings in Gujarath and that the

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plaintiff and his predecessors travelled out of Gujarath and received offerings within the territorial limits of the jurisdictions of the other Maths and that if the defendant and his preceptors did the same in Gujarath, the plaintiff suffered no injury and was not entitled to claim damages and injunction.

The Subordinate Judge found that his Court had jurisdiction to try the suit so far as it referred to the district of Ahmedabad and the people residing in that district; that the plaintiff was the lawfully appointed Shankaracharya of the Sharada Math of Dwarka and being the present Shankaracharya of that Math, he was entitled to bring the present suit; that the Jyotir Math of Badrinath had been without a Shankracharya for more than a century and there could be no branch of it in Dholka according to the rules laid down or intended to be laid down by the founder of that Math and the defendant was not a Shankaracharya of that Math or a branch of that Math; that the defendant could not found a branch or branches of the Jyotir Math at Dholka or any other place in the Ahmedabad District and he was not entitled to go round as a Shankaracharya of the Jyotir Math or of the Dholka branch of it for offerings in places within the limits of the jurisdiction of the Court and to collect such offerings from people residing therein as such Shankaracharya; that the claim was in time; and that the plaintiff could not sue for an account and could not recover those offerings or their value which had been voluntarily made to the defendant. The Subordinate Judge, therefore, passed the following decree:—

I therefore declare that the defendant is not entitled to call himself a Shankaracharya of the Jyotir Math of Badrinath or of a branch of it at Dholka and to claim or receive any offerings from the people of the Judicial District of Ahmedabad in his assumed capacity of a Shankaracharya of the Jyotir Math of Badrinath or of the so-called branch of it at Dholka and that he do restrain himself from calling himself as Shankaracharya of the Jyotir Math or of the so-called branch of it at Dholka and from claiming or receiving such offerings from the people of the district of Ahmedabad as such Shankaracharya of the Jyotir Math or of the so-called branch of it at Dholka. The rest of the plaintiff's claim is disallowed hereby.

The defendant appealed.

C. N. Thákore (with *G. N. Thákore*) appeared for the appellant (defendant):—Section 21 of Bombay Regulation II of 1827

provides that no interference by Courts of law in caste questions is warranted. The plaintiff's suit is a caste question within the meaning of the Regulation and hence is not maintainable. The plaintiff calls himself a Shankaracharya of a Math called the Sharada Math at Dwarka. The defendant is a Shankaracharya of the Jyotir Math which has its branch at Dholka. The followers of the religion propounded by the original Shankaracharya constitute a sect some of whom may attach themselves to the plaintiff as one of the successors of the original *Guru*, while some may be devoted to the defendant who is another successor, while others may be attached to both. In the present suit the plaintiff has opened up the question of the right of devotees to attach themselves to the *Guru* to whom they feel themselves drawn. This right is purely a religious right involving the internal autonomy of the members of the sect or caste in matters religious. Such a right could not be rendered the subject of litigation in a Court of law. The term caste in the Regulation is not restricted to caste as used in a strictly limited sense. It has been held that the term is not necessarily confined even to the Hindus: *Abdul Kadir* v. *Dharma*[1]. The followers of the religion of Shankaracharya are therefore clearly included within the definition of the term. The circumstance of offerings being occasionally made to the religious head will not avail to take the case out of the category of caste questions. The principle of the Regulation is followed in other provinces: *Roodurmun* v. *Damoodur*[2]. The prohibition contained in the Regulation is held applicable to numerous cases in some of which the emoluments were in the nature of fixed periodical fees. See also *Shankara* v. *Hanma*[3], *Murari* v. *Suba*[4], *Dayaram Hargovan* v. *Jethabhat Lakhmiram*[5], *Murar Daya* v. *Nagria Ganeshia*[6]. The Regulation is, therefore, very clearly a bar to the maintenance of the present suit.

Next we contend that, even apart from the Regulation, the suit is not one of a civil nature and is therefore beyond the cognizance of Civil Courts. No straining of language can bring

(1) (1895) 20 Bom. 190.
(2) (1862) 1 Hay 365.
(3) (1877) 2 Bom. 470 at pp. 472, 473.
(4) (1882) 6 Bom. 725.
(5) (1895) 20 Bom. 784.
(6) (1869) 6 Bom. H. C. R., A. C. J. 17.

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the present suit within the description of suits referred to in the explanation to section 11 of the Civil Procedure Code of 1882 as being of a civil nature. What the plaintiff claims is a declaration that the defendant is not entitled to the style, title and dignities of a Shankaracharya and a further declaration that the defendant is not entitled to collect offerings in his assumed capacity of a Shankaracharya or of a Shankaracharya of the Jyotir Math or of its branch at Dholka. The other reliefs claimed are either subsidiary to the above or are merely consequential. No objection is taken to the defendant's collecting offerings without calling himself a Shankaracharya. Such a claim could not have been made by the plaintiff in the absence of any grant from the Crown; certainly not in the absence of a grant from the original Shankaracharya. The suit, therefore, resolves itself into a suit in respect of style, title and dignities. In *Sri Sunkur Bharti Swami* v. *Sidha Lingayah Charanti*[1] the Privy Council doubted whether an action could be maintained in a Civil Court by the grantee of a dignity from the Crown against a person who without a grant would assume the like dignity. On remand the High Court of Bombay held that such an action could not be maintained. See also *Shankara* v. *Hanma*[2]. In the present case there is even no allegation of a grant. Besides, the name or title of Shankaracharya has not been let down as a heritage by the original *Guru*: Ghose's Hindu Law, p. 784 (2nd edn.). The suit is, therefore, clearly not maintainable as being one brought to vindicate a right to mere dignity: *Sangapa* v. *Gangapa*[3].

The office of the Shankaracharya of the Sharada Math at Dwarka has nothing to do with the right to assume the title of a Shankaracharya within particular limits. Even if the right to this dignity be assumed to be in any way connected with the office at Dwarka, that circumstance makes no difference: *Rama* v. *Shivram*[4].

The office, if it is called one, of Shankaracharya consists, strictly speaking, of the right to exercise moral and spiritual supervision

(1) (1843) 3 Moo. I. A. 198 at p. 217.
(2) (1877) 2 Bom. 470.
(3) (1878) 2 Bom. 476.
(4) (1882) 6 Bom. 116 at p. 121.

over the followers of the original *Guru*. No suit could lie for the enforcement of claims appurtenant to such an office: *Tholappala Charlu* v. *Venkata Charlu*[1].

The suit is in effect to compel a particular kind of religious observance from certain people which being an obligation of a moral kind is not enforceable: *Striman Sadagopa* v. *Kristna Tatachariyar*[2]. The circumstance of pecuniary presents being received by the occupant of the office hardly makes any difference, as these are not any fixed and certain emoluments attached to any office but are voluntary offerings in the nature of fluctuating gratuities: *Boyter* v. *Dodsworth*[3], *Muhammad Yussub* v. *Sayad Ahmed*[4], *Tholappala Charlu* v. *Venkata Charlu*[1], *Narayan Vithe Parab* v. *Krishnaji Sadashiv*[5].

It is not alleged that the defendant ever moved about calling himself Shankaracharya of the Sharada Math. No fees are claimable as of right by any Shankaracharya from his followers within any given area. The plaintiff's office, being confined to duties of a moral and spiritual kind, is in no way interfered with by the defendant's claiming similar functions in a distinct capacity. No cause of action can accrue under such circumstances to the plaintiff.

The cases relied on by the Subordinate Judge are not on all fours and are clearly distinguishable. In none of them a claim to mere dignities was made. The case of *Gursangaya* v. *Tamana*[6] was a case in which there was a contest in respect of fees claimable as of right by the plaintiff in virtue of the office he was holding. In *Sayad Hashim Saheb* v. *Huseinsha*[7] there was direct interference with the exclusive right to perform the duties and enjoy the privileges specifically appertaining to the office of the Vatandar Kazi and Khalif of Gadag, which was held by the plaintiff. In *Srinivasa* v. *Tiruvengada*[8] it is expressly stated that, where the claim is for a mere dignity or for damages caused by loss of voluntary offerings, no relief can be given. In

(1) (1895) 19 Mad. 62 at p. 64.
(2) (1863) 1 Mad. H. C. R. 301.
(3) (1796) 6 T. R. 681.
(4) (1861) 1 Bom. H. C. R., App. xviii, pp. xxxv, xxxvi.
(5) (1885) 10 Bom. 233.
(6) (1891) 16 Bom. 281.
(7) (1888) 13 Bom. 429.
(8) (1888) 11 Mad. 450.

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Sri Sadagopa Ramanuja Pedda v. *Sri Mahant Rama Kisore Dossjee*[1] relief was granted as the defendant's action amounted to an attempt to deceive by misrep resentation implied in the use of the word "vegayre."

We further contend that no exclusive right to assume the title of Shankaracharya and to receive the offerings in that capacity has been proved by the plaintiff. The *onus* on this point was on the plaintiff. No work proved to have been written by the original Shankaracharya himself confers or refers to such right. The works of Anandgiri, Madhav and other authoritative biographers of Shankaracharya's life prove the absence of such a right. Aiyar mentions no such right as having existed. Mathamnaya, on which the plaintiff relies, is not a work of Shankaracharya and could not have come down from him.

It is extremely unlikely that limits would be fixed by one who was himself an itinerant preacher and who wanted to spread his own religion. If *Sanyasis* could go everywhere, then why not the head of the *Sanyasis*? No right as such to receive gifts had accrued to Shankaracharya and he could not hand it down, fixing limits for the exercise of the right. Different Vedas, Gods and Goddesses having been assigned to each principal Math and the followers having the liberty to elect either in all the parts of India, the fixing of territorial limits would be absurd and anomalous. In no analogous institution do we find such limits fixed. The fixing of territorial limits would be inconsistent with an increase in the number of the Maths. The Maths have undoubtedly increased numerically: *Sri Sunkur Bharti Swami* v. *Sidha Lingayah Charanti*[2], Ghose's Hindu Law, p. 778 (2nd edn.). People of the Shringeri Math have been going to the remotest corners of India: Hunter's *Imperial Gazetteer*, Vol. XIII, page 79. A branch Math has grown up at Sankeshvar: *Bombay Gazetteer*, Vol. 21, pp. 601 and 602.

D. A. Khare (with *U. K. Trivedi*) appeared for the respondent (plaintiff) :—There is conclusive evidence in the case to show that the defendant is not entitled to the style, title and dignities

(1) (1898) 22 Mad. 189.

(2) (1843) 3 Moo. I. A. 198 at p. 217.

of a Shankaracharya of the Jyotir Math. For several hundred years past there has been no Shankaracharya on the *gadi* of the Jyotir Math and the affairs of that *gadi* are in the hands of a Brahmin. The defendant cannot trace his descent from any actual occupier of the *gadi*. One is entitled to be called a Shankaracharya only if he occupies one of the four *gadis* founded by the original Shankaracharya. The four seats were endowed with separate and exclusive jurisdictions, the extent of which has been set forth in the Mathamnaya.

The jurisdictions being exclusive, the defendant, even if he be a genuine Shankaracharya, has no right to establish himself in Gujarath which is within the jurisdiction of the plaintiff. All plaintiff's witnesses and several of defendant's witnesses admit that Gujarath is within the jurisdiction of the plaintiff's Sharada Math.

The defendant's predecessors in title established themselves at Dholka so recently as 1873. Since that time to this their rights have been repeatedly challenged in Civil Courts and they have failed to establish those rights.

Shankaracharya's is a high religious office with *quasi*-judicial functions on questions of religion, law and ritual in the Hindu society, and the organization of the four Maths with exclusive jurisdictions was necessary to prevent conflicts of authority and jurisdiction.

The question has to be looked to from the standpoint of a Hindu sovereign. Would a Hindu sovereign tolerate an imposter and allow him to feign the office and dignities of Shankaracharya?

The plaintiff has cause of action as the office is instituted for public benefit. Although the emoluments consist of merely voluntary gifts the plaintiff has a cause of action because according to the rules of ascetic life admitted by the defendant no *Sanyasi* can accept a pecuniary gift unless he is a Shankaracharya. The defendant himself admits that nobody would give him any gift if he did not style himself Shankaracharya. The defendant being not entitled to the style and privileges of Shankaracharya, his act in assuming the same is fraudulent and

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wrongful, and the cause of action so accrued to the plaintiff, he being the rightful claimant of the privileges of Shankaracharya in Gujarath. We do not, however, press the claim for damages, but we maintain that the decision of the lower Court as to the other relief, declarations and injunction is correct, and as given by a Hindu Judge of high learning and experience is entitled to great weight.

SCOTT, C. J.:—The plaintiff brought this suit for a declaration that the defendant is not entitled to the style, title and dignities of a Shankaracharya and that he is not entitled to call for or receive any offerings from the people of Ahmedabad and other places in Gujarath either in his assumed capacity of a Shankaracharya or of a Shankaracharya of the Jyotir Math or of a branch of that Math; for an account of the money received by the defendant as a Shankaracharya in Gujarath with a decree for payment to the plaintiff of the sum found to have been so received by the defendant, and for an injunction restraining the defendant from styling himself a Shankaracharya in Gujarath and from claiming or receiving offerings in Gujarath as a Shankaracharya or as a Shankaracharya of the Jyotir Math or of a branch of the Jyotir Math of Badrinath. The Subordinate Judge made a declaration that the defendant is not entitled to call himself a Shankaracharya of the Jyotir Math of Badrinath or of a branch of it at Dholka and to claim or receive any offerings from the people of the Judicial District of Ahmedabad in his assumed capacity of a Shankaracharya of the Jyotir Math of Badrinath or of the so-called branch of it at Dholka; and an injunction against the defendant so styling himself and claiming or receiving offerings. He held, however, that the claim for an account and recovery of offerings received by the defendant was unsustainable, as the offerings might or might not have been made to the plaintiff. From the decree of the Subordinate Judge the defendant has appealed to this Court.

It is not disputed that the religious reformer Shankar, about the 8th century A. D., established four Maths or Monasteries for Sanyasis or Ascetics in the North, South, East and West of India, namely, the Jyotir Math at Badrinath in the Himalayas,

the Shringeri Math in Southern India, the Sharada Math at Dwarka in Gujarath and the Govardhan Math at Puri in Cuttack.

The name Shankaracharya, which means 'the preceptor Shankar,' properly belongs to the reformer Shankar alone, but after his death some of his leading followers appear to have adopted the name as a title, probably, as Mr. Ghose in his work on Hindu Law (p. 784) suggests, because they thought themselves incarnations of the reformer.

The doctrines of Shankar having obtained a permanent footing in India there naturally arose in the course of centuries other preachers besides the Mohunts of the original Maths who claimed to be incarnations of the founder and established new Maths in his honour. On the other hand, the original Maths did not continuously preserve their early prestige. Thus we find the Mohunt or head of the Shringeri Math writing in Shake 1774 (A. D. 1852) to the Mohunt of the Sharada Math a letter (exhibit 333) in which he thought it necessary to make "a statement of the conventional practice bearing in mind the disrespect with which it is treated in the present generation." He relates how the Acharyas of the Govardhan and Jyotir Maths degraded themselves to the position of Gosains and thus these two Maths remained without any Acharya although the Govardhan Math was subsequently revived by a Sanyasi from Gougak Nakhal. He describes how Sanyasis of the Shringeri Math have established Maths and set themselves up falsely as independent Acharyas and he combats the doctrine that any branch Maths can exist. He then proposes that certain areas should again be recognized as the territories of the respective Maths. We note from the report in 3 Moore's Indian Appeals, p. 199, that it was proved or alleged in the case of *Sri Sunkur Bharti Swami* v. *Sidha Lingayah Charanti*[1] that the Shringeri savasthan had by 1835 A. D. been divided into five or six Maths, the Swamis of each of which claimed equal privileges as successors of Shankar.

It is claimed on behalf of the defendant that his predecessor in 1872 established or re-established the Jyotir Math at Dholka.

(1) (1843) 3 Moo. I. A. 198.

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This was not the first time that rival Shankaracharyas had appeared in Gujarath; thus the witness Maneklal Keshowlal (exhibit 241) states that in Gujarath before Raj Rajeshwaranand, the defendant's predecessor, two other Shankaracharyas had come but as they proved to be false they went away.

The establishment of the Math at Dholka followed by visitations and preaching by its Mohunt in various parts of Gujarath caused dissension amongst the Smart Brahmins, particularly at Sidhpur, and soon aroused opposition from the Mohunt of the Sharada Math.

The opposition was based upon practical as well as sentimental grounds, for it is customary for a successful preacher to receive money offerings from his admirers, and the attraction of followers to the Dholka Mohunt involved the withdrawal of probable or possible donors of offerings from the Dwarka Mohunt. In order to put a stop to the competition of the Dholka Mohunt the plaintiff in 1887 with the concurrence of his preceptor the then Mohunt of the Dwarka Math filed a criminal complaint at Sidhpur against Raj Rajeshwaranand, the then head of the Dholka Math, charging him with cheating by personating the Shankaracharya of the Jyotir Math. This complaint was dismissed and three other complaints of a similar nature brought against Raj Rajeshwaranand by Brahmin followers of the Dwarka Mohunt suffered the same fate.

The present suit is the first attempt made in a Civil Court to challenge the right of the occupant of the Dholka Math to preach as a Shankaracharya in Gujarath.

It is contended on the plaintiff's behalf that he has, throughout that part of India where Gujarathi is spoken, the exclusive privilege of preaching as a Shankaracharya and receiving the offerings of the followers of Shankar. This contention is based upon passages in certain versions of the Mathamnaya or traditional precepts of the Maths produced by some of the plaintiff's witnesses.

There is no authoritative version of the Mathamnaya and witnesses for the defendant have produced other versions of it

which differ in material particulars from those relied upon by the plaintiff. Thus, the plaintiff's versions after prescribing certain territorial limits for each Math contain the following precepts (see exhibit 335, paragraphs 25 and 26):—"The head preceptors should never enter into each other's territories, that is the rule. Good rules would be violated by transgression of the boundaries. It gives rise to an abode of quarrels; one should avoid that."

The defendant's versions do not contain these precepts nor any definition of territorial limits. It is not argued that the Mathamnaya was composed by Shankar himself and a learned witness for the plaintiff, Anandshankar Bapubhai, says that he has not read any work of the first Shankar in which he has defined the territories of the Maths. If there ever was any strict reservation of areas for the Mohunts of the different Maths certain facts proved in the case indicate that the reservation has long been disregarded. Thus, in recent times the Mohunt of the Shringeri Math and the deputy of the Mohunt of the Govardhan Math have visited Gujarath and taken offerings from their admirers while the plaintiff's predecessor visited Mathura and Benares and received offerings in those places. Again, when Raj Rajeshwaranand, the defendant's predecessor, came to Sidhpur in Gujarath as a Shankaracharya it is on record that the plaintiff who was then a disciple of the Mohunt of the Sharada Math made a mental obeisance in his honour.

It is clear from the above references to the evidence that the plaintiff has not succeeded in proving any exclusive and unbroken customary privilege for himself and his predecessors to preach and receive offerings as Shankaracharya in Gujarath. But, even if he had succeeded in discharging this burden, his suit would still fail, unless he could show that his claim was of a civil nature such as the Court will entertain: see Civil Procedure Code, section 11.

To decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts, nor will they grant injunctions to prevent preachers from preaching where they like under any title they please,

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provided no office or property is disturbed or interfered with. The Subordinate Judge has treated the case as one of disturbance of an office, namely, the office of Mohunt of the Sharada Math, although his decree is to restrain the defendant from styling himself Shankaracharya of the Jyotir Math and from claiming or receiving offerings in that capacity. Here there is clearly a confusion of ideas. The office of Mohunt of the Sharada Math is in no way endangered by the defendant's action in claiming to be a Shankaracharya of the Jyotir Math, nor are voluntary offerings made to Shankaracharyas in Gujarath fees claimable as of right by the holder of the plaintiff's office. The office, its property and appurtenant fees remain absolutely unaffected by the defendant's action. The defendant has never tried to represent himself or pass himself off as the Mohunt of the Sharada Math. The conclusion arrived at by the Subordinate Judge that the defendant was not truly the Shankaracharya of the Jyotir Math could not help the plaintiff's case. Even if we assume that conclusion to be correct it was irrelevant, for if the plaintiff had an exclusive privilege of preaching which could be enforced in a Civil Court, it could not matter what the real status of the defendant might be, while if he had no such privilege his suit must fail. The appearance of the defendant and his predecessors as Shankaracharyas in Gujarath may have affected the prestige as preachers of the heads of the Sharada Math, but for interference with a mere dignity no suit can be maintained: see per Lord Campbell in *Sri Sunkur Bharti Swami* v. *Sidha Lingayah Charanti*[1], *Sangapa* v. *Gangapa*[2], *Rama* v. *Shivram*[3]. Their appearance may also, by attracting offerings to themselves, have reduced the sums which would have been received by the Sharada Mohunts as voluntary offerings; but for voluntary offerings received no suit will lie: see *Boyter* v. *Dodsworth*[4]. On this ground the Subordinate Judge seems to have refused an account though he inconsistently granted an injunction to restrain the receipt of further offerings.

(1) (1843) 3 Moo. I. A. 198 at p. 217.
(2) (1878) 2 Bom. 476.
(3) (1882) 6 Bom. 116.
(4) (1796) 6 T. R. 681.

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For the above reasons we hold that this suit is not maintainable. We allow the appeal, set aside the decree, and dismiss the suit with costs throughout on the plaintiff.

Cross-objections dismissed with costs.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

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UMABAI KOM MANGESHRAV AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VITHAL VASUDEV AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 28—Lands situate at different villages and in possession of different persons under different titles—One suit to recover possession of the lands—Misjoinder of parties or causes of action—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial.

The plaintiff, one of the reversionary heirs, sued to recover possession of a moiety of certain lands which were situate at different villages and in possession of different persons who were alienees by sale, mortgage or lease from the widow of the last male holder. In the lower Courts the suit was dismissed for misjoinder of parties or causes of action.

Held, on second appeal, that though the lands were situate in several different villages, provided the venue for the trial is the same, the right of the plaintiff to have her claim tried in one suit is the same as if the different holdings were all in the same village. It is never any bar to a suit in ejectment that many persons are in possession. The only possible objections were on the ground of inconvenience. The difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgments may, if the plaintiff succeeds, be given against different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case.

Ishan Chunder Hazra v. *Rameswar Mondol*(1) and *Nundo Kumar Nasker* v. *Banomali Gayan*(2) approved.

* Second Appeal No. 232 of 1906.

(1) (1897) 24 Cal. 831. (2) (1902) 29 Cal. 871.

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UMABAI v. VITHAL.

Sami Chetti v. *Ammani Achy*(1), *Vasudeva Shanbhaga* v. *Kuleadi Narnapai*(2), *Mahomed* v. *Krishnan*(3) and *Parbati Kunwar* v. *Mahmud Fatima*(4), referred to.

Kachar Bhoj Vaija v. *Bai Rathore*(5), distinguished.

SECOND appeal against the decision of C. C. Boyd, District Judge of Kanara, dismissing an appeal against the decree of R. R. Gangolli, First Class Subordinate Judge of Karwar.

The plaintiff Annapurnabai sued to recover possession of an equal half share in the properties specified in the schedule annexed to the plaint and mesne profits of the said share for the years 1900, 1901 and 1902. It was alleged in the plaint that the plaintiff, defendant 24 Lakshmibai, and Radhabai, deceased, were the daughters of Mangesh *alias* Mangba, who died leaving no sons. After his death, his widow Parvatibai enjoyed the properties till her death which took place on the 30th July 1900. Since then the plaintiff and defendant 24 became entitled to the properties in two equal shares as heirs, their sister Radhabai having died during their mother's life-time. Defendants 1—23 asserted title to the said properties on the ground that the plaintiff's mother had sold, mortgaged or let the lands on *mulgeni* (perpetual lease) to them, but the said transactions became invalid after the death of their mother, therefore they should be set aside. The plaintiff and defendant 24 had in the year 1900 obtained a declaratory decree to the effect that the plaintiff, defendant 24 and their sister Radhabai, who was then alive, were entitled to the properties held by the defendants and that the alienations made in their favour by the deceased Parvatibai could not affect the title of the plaintiff and her sisters after the death of their mother Parvatibai. Defendant 25 was the transferee of the right, title and interest of defendant 24. Defendants 1—23 refused to give up the plaintiff's share in the properties though they were called upon to do so, hence the present suit.

Defendants 1—23 claimed to hold the properties as mortgagees, purchasers or *mulgeni* tenants under the plaintiff's mother

(1) (1873) 7 Mad. H. C. R. 260.
(2) (1874) 7 Mad. H. C. R. 290.
(3) (1887) 11 Mad. 106.
(4) (1907) 29 All. 267.
(5) (1883) 7 Bom. 289.

Parvatibai and contested the claim on the ground of limitation and misjoinder of parties or causes of action.

Defendant 24 answered that though she had transferred her half share to defendant 25, the transfer was fraudulent and without consideration, therefore, it should be set aside and her share should be given to her.

Defendant 25 asserted his title under the deed of transfer passed to him by defendant 24 on the 8th December 1891.

The Subordinate Judge raised in all fifteen issues, but he found on issues 6, 7 and 15 only. His findings on those issues were :—

(6) The claim was within time.

(7) The suit was bad for misjoinder of parties or causes of action.

(15) The plaintiff was not entitled to any relief.

The Subordinate Judge therefore dismissed the suit. The following is an extract from his judgment :—

Issues 6, 7 and 15.—These issues are the most important ones in this case, and go to the root of the plaintiff's claim. The property described in the plaint admittedly belonged to the plaintiff's deceased father Mangesh *alias* Mangba bin Dulba Shenvi. He died in the year 1852, leaving a widow Parvatibai *alias* Manakbai and 2 sons, Subraya and Pundi *alias* Pundlik. Subraya died in the year 1853 or 1854, leaving a widow Mathura. * * Mathura died in the year 1869 or 1870. Parvati died on the 30th July 1900. Exhibits 4, 5, 6 and 7 show that Pundlik was adopted by Raghunath Krishna Shenvi, a brother of the deceased Parvatibai. It is in evidence that Pundlik too died some years ago, though the exact year of his death cannot be ascertained. Although the plaintiff ingeniously describes this claim as a suit for partition, yet it is evident that her intention is to obtain a declaratory decree that the several alienations made by her mother to many of the defendants in this case are invalid against her after her mother's death.

The suit as framed is not maintainable, as it includes within it several distinct causes of action which could not be joined together in the same suit—*Kachar Bhoj Vaija* v. *Bai Rathore*(1) ; *Ganeshi Lal* v. *Khairati Singh*(2). In *Sadu bin Raghu* v. *Rama bin Govind*, the Bombay High Court has approved of the decision at page 289, I. L. R. 7 Bombay, though it has been doubted in Madras —*Mahomed* v. *Krishnan*(3) ; vide I. L. R. 16 Bombay 608 at p. 611. The

(1) (1883) 7 Bom. 289. (2) (1894) 16 All. 279.

(3) (1887) 11 Mad. 106.

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Allahabad decision (I. L. R. 16 All. 279) is on all fours with the present case. This Court is not bound to follow the decisions of the Madras High Court on this point, as it is bound by the decisions of the Bombay High Court in cases of difference of decisions (I. L. R. 17 Bombay, page 555, at page 556). There are ample materials in the evidence recorded in this case to show that the plaintiff's mother Parvatibai held the property in suit adversely to her son Subba, and the latter's widow Mathura who died in the year 1869. She must, therefore, be treated as absolute owner of the property in suit even before the death of Mathura, the widow of Subba *alias* Subraya. It is admitted in the plaint itself that plaintiff's mother Parvatibai enjoyed and dealt with the property from the very day of the death of Mangba in 1852. The evidence afforded by exhibits 284, 300 and 310 is a sufficient indication that Parvatibai's possession of the property in suit before its alienation was adverse to her son Subbaya, and the latter's widow Mathura. Under the circumstances disclosed in this case, I find that the suit is bad for misjoinder of different causes of action against different defendants, in spite of the fact that it is ingeniously designated as a suit for partition, and that it is not in time. The plaintiff was asked to adopt the course indicated in I. L. R. 16 All. 279, but she did not do so in time.

The plaintiff having appealed, the District Judge summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882). His reasons were as follows:—

I fully agree with the remarks in the judgment that there is every indication that Parvatibai's possession of the property after the death of Mangba was hostile to Subraya and his widow and plaintiff.

It is proved that Parvatibai dealt with parts of the property in her own name instead of in the name of the owners whose guardian she was. The contention that she did not mean, by putting her name, to make herself out owner, will not stand. No guardian acting honestly would behave so. In the plaint in the present suit plaintiff admits that Parvatibai "enjoyed and disposed of" the property since the death of Mangba.

Things being so, clearly the object of this suit was to obtain declaratory decrees against each of the various alienees of Parvatibai; and thus the facts are the same as in *Ganeshi Lal* v. *Khairati Singh* (16 All. 279) which has been twice approved by our own High Court. Mr. Shantaya (appellant-plaintiff's pleader) did not deal with this point at all, but contented himself with arguing that in a suit for partition interested third parties, taking their right from some member of the family, may be added as parties (16 Bom. 698). That is not the point here. This last-mentioned decision upholds the Allahabad ruling above mentioned.

Another decision cited by Mr. Shantaya, reported at p. 925 of Vol. VII, Bombay Law Reporter, does not apply; for the plaint itself in this case shows plaintiff's object.

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The plaintiff preferred a second appeal and she having died pending the appeal her daughters Umabai and Radhabai were brought on the record as her heirs.

Raikes (with *N. A. Shiveshvarkar*) for the appellants (heirs of the plaintiff) :—We contend that the lower Courts erred in law in holding that our suit was bad for misjoinder of parties or causes of action. The plaintiff's cause of action arose on the death of her mother Parvatibai and then she found that several persons were in possession of the properties of which she wanted to recover possession. It is true that the defendants claim under different titles, such as purchasers, mortgagees and lessees. But the cause of action has no relation whatever to the defences which may be set up by the defendants. Nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words to the media upon which the plaintiff asks the Court to arrive at a favourable conclusion : *Mussummat Chand Kour* v. *Partab Singh*[1]. In the present case the plaintiff had one cause of action only, namely, the right to recover her share of the property on the death of her mother. The cause of action accrued to her on her mother's death. We rely on section 28 of the Civil Procedure Code and *Ishan Chunder Hazra* v. *Rameswar Mondol*[2], *Nundo Kumar Nasker* v. *Banomali Gayan*[3], *Sami Chetti* v. *Ammani Achy*[4], *Vasudeva Shanbhaga* v. *Kuleadi Narnapai*[5], *Mahomed* v. *Krishnan*[6], *Parbati Kunwar* v. *Mahmud Fatima*[7]. The lower Court relied upon *Kachar Bhoj Vaija* v. *Bai Rathore*[8] and *Ganeshi Lal* v. *Khairati Singh*[9] for holding that the suit was bad for misjoinder. But the first case is clearly distinguishable. It was not a suit for possession. Therein a declaration was claimed during the lifetime of the widow and the cause of action accrued to the reversioner for a declaration with respect to each of the aliena-

(1) (1888) L. R. 15 I. A. pp. 157-158.
(2) (1897) 24 Cal 831.
(3) (1902) 29 Cal. 871.
(4) (1873) 7 Mad. H. C. R. 260.
(5) (1874) 7 Mad. H. C. R. 290.
(6) (1887) 11 Mad. 106.
(7) (1907) 29 All. 267.
(8) (1883) 7 Bom. 289.
(9) (1894) 16 All. 279.

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tion that was made. The second ruling is no doubt against us, but it does not seem to have been followed in any later case. It is a ruling of the Allahabad High Court and that Court refused to follow it in *Parbati Kunwar* v. *Mahmud Fatima*[1].

The finding of the Judge in appeal as regards adverse possession is clearly wrong. Neither of the exhibits relied upon by him supports the finding. He finds that Parvatibai was the guardian of her son and daughter-in-law. If that be so, then evidently her possession could not be adverse to her wards until she renounced her character as their guardian and held adversely to them. Moreover, the Judge has recorded the finding of adverse possession under the issue as to limitation. This is wrong. Under that issue we had only to shew that our suit was in time under Article 141, Schedule II, of the Limitation Act. The Judge should have raised a distinct issue relating to adverse possession and should have given an opportunity to the parties of adducing evidence thereon. It raises a question of title and requires a specific issue.

S. S. Patkar for respondents 1, 6, 20, 21 and 22 (defendants 1, 6, 20, 21 and 22) :—The suit is bad for misjoinder of causes of actions. The defendants are interested in different lands and the causes of actions against them are not triable jointly, severally or in the alternative in respect of the same matter. Section 28 of the Civil Procedure Code cannot apply because the right to relief is not alleged severally against the defendants in respect of the same matter. The defendants claim under different alienations. The plaintiff alleges in the plaint that the different alienations are not binding on her. The expression "in respect of the same matter" in section 28 means one entire subject-matter in the whole of which the defendants are liable jointly, severally or in the alternative. We rely on *Kachar Bhoj Vaija* v. *Bai Rathore*[2] which rules that the different alienations by the widow are distinct causes of action which could not be joined together in one suit. The case of *Ganeshi Lal* v. *Khairati Singh*[3] which follows *Narsingh Das* v. *Mangal*

(1) (1907) 29 All. 267. (2) (1883) 7 Bom. 289.
(3) (1894) 16 All. 279.

Dubey[1] is on all fours with the present case. The expression "cause of action" comprises not only the plaintiff's title when in issue, but amongst other things the wrongful possession of the separate sets of defendants or any two of the sets in the alternative in respect of the same matter: *Ganeshi Lal* v. *Khairati Singh*[2]. With regard to the view of the Madras High Court as to the desirability of deciding the whole question in order to secure soundness of the particular decision and avoidance of discordant decisions in different cases on facts nearly the same, the Allahabad High Court observes on the other hand in *Ganeshi Lal* v. *Khairati Singh*[2] that the decision as to the rights of one person might be affected by the rights of another alienee. The ruling in *Kachar Bhoj Vaija* v. *Bai Rathore*[3] is opposed to *Sadu bin Raghu* v. *Ram bin Govind*[4]. We rely also on *Sudhendu Mohun Roy* v. *Durga Dasi*[5] and *Ram Narain Dut* v. *Annoda Prosad Joshi*[6]. In the present case there is no allegation of collusion between the defendants. We also rely on *Mussammat Gopal Devi* v. *Jai Narain*[7]. Then again there are different causes of actions against several alienees and these causes of actions are joined with the cause of action against defendant 24 for partition.

We take our stand on sections 31, 45 and 53 clause (*3*), of the Civil Procedure Code. The suit is therefore bad for misjoinder of causes of action.

With regard to the question of adverse possession the issue that was raised in the first Court was—"Is the claim within time?" If the claim of Subraya and Mathurabai was barred as against Parvati, she got title by prescription under section 28 of the Limitation Act and there was a statutory conveyance to her. Therefore the alienees of Parvati got absolute title. The Subordinate Judge found that Parvati's possession was adverse to her son Subraya and his widow Mathura. In the appeal Court, the appeal being summarily dismissed, the defendants

(1) (1882) 5 All. 163.
(2) (1894) 16 All. 279.
(3) (1883) 7 Bom. 289.
(4) (1892) 16 Bom. 608 at p. 612.
(5) (1887) 14 Cal. 435.
(6) (1887) 14 Cal. 681.
(7) (1905) P. R. No. 1 of 1905 (Civ. J.).

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were not heard; therefore the finding that Parvati was guardian is not binding on us. The Judge in appeal, however, found as a fact that Parvati's possession was adverse. Exhibit 284 says that when Subraya died he was about 20 years old. So the time having once begun to run in Subraya's lifetime it could not be stopped by the minority, if any, of Mathura. Further, the plaintiff admits in her plaint that Parvati enjoyed and disposed of the property since the death of Mangba, which took place in 1852. Further, Pundlik being adopted by Parvati's brother, the adoption was invalid and Pundlik remained the son of Mangba. Therefore the possession of Parvati was adverse to the two owners Subraya and under him his widow Mathura and also Pundlik. Besides, Parvati had got the *khátás* transferred to her name. Lastly, the plaintiff should not be allowed to elect according to *Kachar Bhoj Vaija* v. *Bai Rathore*[1].

S. A. Hatyangadi for respondents 18 and 19 (defendants 18 and 19):—The determination of the question of misjoinder must depend for the most part upon the frame of the plaint. In the present case the plaintiff sets out briefly the various alienations under which the defendants claim and wants to have them set aside. This is, therefore, in substance a suit for a declaration that the several alienations are bad as against the plaintiff. The lower Courts were thus right in applying the case of *Kachar Bhoj Vaija* v. *Bai Rathore*[1]. It was contended that the plaintiff's claim against the several defendants was "in respect of the same matter" and that the suit was allowed by the terms of section 28 of the Civil Procedure Code. According to that contention "the same matter" would mean the estate to which the plaintiff was entitled as heir. If that is so, then the contention is not sound. We submit that "the same matter," that is, the estate is, as it were, a constant quantity, and as each of the defendants, according to the statement in the plaint, is interested in a fragment of the estate, it cannot be said that the right to relief is claimed against the defendants severally in respect of "the estate," that is, the whole estate, unless the words such as "the whole or part of" are interpolated after the words "in

(1) (1883) 7 Bom. 289.

respect" in section 28. It is not suggested that any relief is claimed against the several defendants in the alternative. Nor can it be argued that they are jointly liable because no combination or conspiracy is alleged: *Sudhendu Mohun Roy* v. *Durga Dasi*[1], *Ram Narain Dut* v. *Annoda Prosad Joshi*[2]. The rulings in *Ishan Chunder Hazra* v. *Rameswar Mondol*[3], *Nundo Kumar Nasker* v. *Banomali Gayan*[4] and *Parbati Kunwar* v. *Mahmud Fatima*[5], which were relied on, do not apply because therein the suits were differently framed. The *ratio decidendi* of those cases would appear to be that the question of misjoinder would not arise simply because different defences are raised by the defendants. Here, however, the plaint itself wants that the several alienations should be set aside. Those cases are therefore distinguishable on this ground. The reason of the decision in *Vasudeva Shanbhaga* v. *Kuleadi Narnapai*[6] is that it is desirable to go into several alienations at one and the same time because one might affect the propriety or legality of the other or others. In the present case, however, the alienations range over such a long period and the interval between the several alienations is so great that that consideration does not arise. Moreover, it is not correct to say that there is one cause of action in the present case. The plaintiff's title to the whole property is, no doubt, the same. But that circumstance does not constitute the cause of action. The cause of action against each of the defendants is by virtue of his independent wrongful possession, and no combination having been alleged to exist among the defendants, the causes of action are different. They cannot, therefore, be joined in one suit: *Ganeshi Lal* v. *Khairati Singh*[7], *Kachar Bhoj Vaija* v. *Bai Rathore*[8], *Sudhendu Mohun Roy* v. *Durga Dasi*[1].

As regards the finding that the widow Parvatibai was the guardian of the owners who were minors, there is no legal evidence on the point. The only legal evidence is to the effect that they were not minors. Therefore the finding of adverse possession is good.

(1) (1887) 14 Cal. 435.
(2) (1887) 14 Cal. 681.
(3) (1897) 24 Cal. 831.
(4) (1902) 29 Cal. 871.
(5) (1907) 29 All. 267.
(6) (1874) 7 Mad. H. C. R. 290.
(7) (1894) 16 All. 279.
(8) (1883) 7 Bom. 289.

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S. V. Palekar for respondents 10, 16, 21 and 22 (defendants 10, 16, 21 and 22) :—As to misjoinder it was contended that, inasmuch as the defence of all the defendants is the same, there was no misjoinder. But all the defendants may not choose to put forward the same defence, and as a matter of fact, in the present case, they have not put forward the same defence. It is not that a widow as such has absolutely no power of alienation. If that were so, then the position would have been simple. But the law is that a widow has the power of alienation provided there are certain justifying circumstances and those justifying circumstances may be different in different cases. It is a common experience that even in a suit, which is concerned with only one or two alienations by a widow and therefore with proving only a few justifying circumstances, the proceedings lengthen over a considerable period, entailing upon the parties unnecessary expense, trouble and waste of time. How much more would be the inconvenience to which the parties would be exposed if their own individual matter is tacked up with others with which they are not at all concerned? Each co-defendant has to prove a certain set of justifying facts, the truth or untruth of which in no way depends upon the truth or untruth of the justifying facts put forward by another defendant in support of the alienation made to him. This is what has happened in the present case. Therefore we submit that the lower Courts were perfectly justified in not allowing the plaintiff to join together all the defendants in one suit. The principle laid down in *Kachar Bhoj Vaija* v. *Bai Rathore*[1] is based upon common experience and governs the present case : *Ganeshi Lal* v. *Khairati Singh*[2].

SCOTT, C. J. :—The plaintiff alleges that one Mangba died without male issue, leaving three daughters, namely, the plaintiff, the defendant 24 and Radhabai deceased, and that after his death his widow Parvati being entitled to his property went on enjoying it and died on the 30th July 1900.

(1) (1883) 7 Bom. 289. (2) (1894) 16 All. 279.

These recitals are admittedly inaccurate, the fact being that Mangba left two sons—Subraya and Pundlik. Pundlik was adopted into another family and the estate of Mangba descended to Subraya. Subraya was succeeded by his widow Mathura and after her death by his mother Parvati, his reversionary heiresses being his sisters, the plaintiff and the defendant 24.

The defendants 1—23 claim to be alienees by sale, mortgage or lease from Parvati. The plaintiff claims to recover the estate from the defendants 1—23 and to partition it between herself and defendant 25 as assignee of the interest of her sister (defendant 24).

In the first Court fifteen issues were raised and evidence was taken upon the whole case but the Subordinate Judge only recorded findings on 3 issues, namely :—

6. Is the suit in time ?

7. Is the suit barred for misjoinder of parties or causes of action ?

15. Is the plaintiff entitled to any relief ?

His finding on issues 6 and 15 was in the negative and on issue 7 in the affirmative and he dismissed the suit. An appeal was presented to the District Judge but he summarily dismissed it under section 551 of the Civil Procedure Code, 1882—holding that Parvati has acquired a title by adverse possession prior to the date of her alienations and that the suit was bad for misjoinder of parties and causes of action. The plaintiff in second appeal to this Court contends, first, that the suit is not bad for misjoinder, and, secondly, that no issue of adverse possession was fairly raised and that if such a question was open to the lower Courts the judgment of the lower appellate Court is bad in law.

We will first deal with the question of misjoinder. Section 28 of the Civil Procedure Code provides that "all parties may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative in respect of the same matter."

The words "in respect of the same matter" are more general than the words "in respect of the same cause of action" in the corresponding section 26 relating to joinder of plaintiffs. But

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for the purposes of this suit the difference is, we think, not material. The course of decisions in the different High Courts as to the propriety of joining in one suit for possession alienees of different portions of the same estate claiming under the same alienor has not been uniform, but according to the present state of authority the High Courts of Calcutta, Madras and Allahabad would permit such a suit to proceed. See *Sami Chetti* v. *Ammani Achy*[1], *Vasudeva Shanbhaga* v. *Kuleadi Narnapai*[2], *Mahomed* v. *Krishnan*[3], *Ishan Chunder Hazra* v. *Rameswar Mondol*[4], *Nundo Kumar Nasker* v. *Banomali Gayan*[5], *Parbati Kunwar* v. *Mahmud Fatima*[6].

The lower Courts and the respondents in this appeal have relied upon *Kachar Bhoj Vaija* v. *Bai Rathore*[7], but that was not a suit for possession. As pointed out in *Gledhill* v. *Hunter*[8], an action for the recovery of land, or as it is called in the Civil Procedure Code, section 44, "a suit for the recovery of immoveable property," is possessory and of a different nature to a suit for the establishment of title not claiming possession, although a claim for declaration of title as part of the machinery for establishing the right to possession might be joined with a suit for recovery of land. "The claim for a declaration of title and the claim for possession are not the cause of action: they are only a statement at full length of what the cause of action really is, namely, to recover the land."

In our opinion the law applicable to the present case is correctly stated in the two Calcutta cases we have above referred to. In the latter of the two it is said: "The cause of action of a plaintiff suing in ejectment cannot, so far as we can perceive, be affected by the title under which the defendant professes to hold possession. It matters not to the plaintiff how the defendant may explain the fact that he is in possession or seek to defend his possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him, and that fact

(1) (1873) 7 Mad. H. C. R. 260.
(2) (1874) 7 Mad. H. C. R. 290.
(3) (1887) 11 Mad. 106.
(4) (1897) 24 Cal. 831.
(5) (1902) 29 Cal. 871.
(6) (1907) 29 All. 267.
(7) (1883) 7 Bom. 289.
(8) (1880) 14 Ch. D. 492 at p. 500.

gives him his cause of action. If this is so, where there is but one person in possession, can there be a difference when the land is in the possession of more than one? We think not. It appears to us, so far as the plaintiff's cause of action is concerned, that it is a matter of indifference to him upon what grounds the different persons in possession may seek to justify the wrongful detention of what is his. What he is entitled to claim is the recovery of possession of his land as a whole and not in fragments."(1)

In the present case the land in suit is situated in several different villages, but provided the venue for the trial is the same, the right of the plaintiff to have his claim tried in one suit is the same as if the different holdings were all in the same village. It was never any bar to a suit in ejectment that many persons were in possession. The only possible objections were on the ground of inconvenience. "When the tenements claimed, and the tenants thereof, are numerous, it is frequently advisable to bring two or more distinct ejectments, rather than one action against all of them for the whole of the property. The exercise of a sound discretion and judgment on this point may sometimes save much trouble." See Cole on Ejectment, p. 76.

In the lower Court any difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Compare the rules of the Supreme Court in England, O. xii, rule 28.

As regards the question of adverse possession we think it should not have been discussed at all upon the 6th issue. It is a question of title requiring a specific issue. The discussion of the question in the judgment of the first Court was very unsatisfactory probably for want of evidence resulting from the absence of a definite issue. The Subordinate Judge mentions exhibits 284, 300 and 310 as justifying his conclusions. As regards exhibit 284 the record of the Court in Cánarese differs from the Judge's note. The Canarese says that after Mangba's death the *vahivat* was carried on by Parvati till her death. This is quite consistent with management as guardian or as senior member of the family without any adverse possession. Exhibit 300 is a

(1) (1902) 29 Cal. 871 at p. 880.

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rent-note passed in 1858 to Parvati by a yearly (*chalgeni*) tenant. Exhibit 310 is an entry in the revenue records of payment to Parvati in 1865 for land taken up for a railway. These exhibits are quite consistent with a management of Parvati on behalf of junior members of the family. In the lower appellate Court the point was still more inadequately dealt with. The District Judge assumes that Parvati was guardian of the owners at the dates of the alienations effected by her. If this was so, the presumption would be that she effected the alienations honestly as guardian and not dishonestly in breach of her trust. The Subordinate Judge had held, and we assume that in dismissing the appeal summarily the District Judge adopted the finding of the first Court, that Subraya had died in 1853 or 1854, *i.e.*, prior to any of the alienations. But alienations by the guardian during the lifetime of Subraya's widow who was the owner of only a limited estate would not prejudice the reversioners unless justified by necessity.

We set aside the decree and remand the case for re-trial. The lower Court should not fail to raise a specific issue as to adverse possession and should consider whether any inconvenience will result from trying the suit against all the defenants at once or whether it should direct the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgments may if the plaintiff succeeds be given against the different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case. Costs costs in the cause.

Decree set aside and case remanded.

G. B. R.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

VACHHANI KESHABHAI AND OTHERS (ORIGINAL PLAINTIFFS), APPLICANTS, *v.* VACHHANI NANBHA BAVAJI AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS.*

1908. *November* 26.

Suits Valuation Act (VII of 1887), section 8—Suit for declaration and consequential relief—Valuation—Court-fees—Jurisdiction—Value of the relief stated in the plaint.

In a suit for declaration and consequential relief (injunction) with respect to land the Court must accept the value of the relief stated in the plaint for the purpose both of the Court-fees and jurisdiction.

Hari Sanker Dutt v. *Kali Kumar Patra*(1), followed.

Dayaram v. *Gordhandas*(2), distinguished.

APPLICATION under the extraordinary jurisdiction, section 622 of the Civil Procedure Code (Act XIV of 1882), against the decision of N. R. Majmundar, Joint First Class Subordinate Judge of Ahmedabad with appellate powers, confirming the order passed by N. V. Desai, Second Class Subordinate Judge of Dhanduka and Ghogho, returning a plaint for presentation to the proper Court.

The plaintiffs brought a suit against the defendant in the Court of a Second Class Subordinate Judge and prayed for the following reliefs :—

(*a*) A declaration that they were owners of a three-fourths share of certain lands called the *Bhathadani Pati* and the income thereof that might be in deposit with the Tálukdári Settlement Officer and also of a three-fourths share of 8¾ *dokdás* of the village site and of every other sort of income from the village of Marchand ;

(*b*) Recovery of Rs. 637-8-0 on account of their share in the income of the said *Pati* for the Samvat years 1956 to 1960 ; and

(*c*) A perpetual injunction restraining the defendants from preventing them from jointly managing the property in dispute.

* Application No. 64 of 1908 under extraordinary jurisdiction.

(1) (1905) 32 Cal. 754. (2) (1906) 31 Bom. 73.

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The first relief was valued at Rs. 130, while the second and the third were valued at Rs. 637-8-0 and Rs. 25 respectively.

The defendants answered that as the value of the property in suit was over Rs. 5,000 the Second Class Subordinate Judge's Court had no jurisdiction to entertain the suit. The Subordinate Judge allowed the defendant's contention and returned the plaint for presentation to the proper Court.

On appeal by the plaintiffs the Appellate Court confirmed the order for the following reasons :—

But the important question is whether the jurisdiction of the lower Court is ousted on this account. The answer to this question depends upon the interpretation that might be put upon section 8 of the Suits Valuation Act, 1887. The suit is governed by section 7, paragraph 4, clauses (c) and (*d*), of the Court-Fees Act as it is a suit for declaration coupled with consequential relief (see I. L. R. 10 Bom. 60, I. L. R. 17 Bom. 53), and the plaintiff is at liberty to value the reliefs he seeks at any amount he chooses and to pay the Court-fee on such amount (I. L. R. 19 Bom. 198 and I. L. R. 17 Bom. 56). Section 3 of the Suits Valuation Act, 1887, empowers the Local Government to make rules determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-Fees Act, 1870, section 7, paragraphs v. and vi, and paragraph x, cl. (*d*); and section 4 provides that when a suit mentioned in the Court-Fees Act, 1870, section 7, paragraph 4, or Schedule II, Article 17, relates to land or an interest in land of which the value has been determined by rules under the last foregoing section, the amount at which, for purposes of jurisdiction, the relief sought in the suit is valued, shall not exceed the value of the land or interest as determined by those rules. Section 8 lays down that when in suits, other than those referred to in the Court-Fees Act, 1870, section 7, paragraphs v, vi and ix, and paragraph x, cl. (*d*), Court-fees are payable *ad valorem*, under the Court-Fees Act, 1870, the value as determinable for the computation of Court-fees and the value, for purposes of jurisdiction shall be the same. It seems to me that when rules are framed under section 3 of the Suits Valuation Act, 1887, the plaintiff, who asks for a declaration and consequential relief, though he is at liberty to value the relief at any amount he likes and pay Court-fee on that amount, cannot put a higher value upon his suit than that determined by those rules. Where no such rules are made the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction is to be the same. No rules have been promulgated by our Local Government under section 3 of the Suits Valuation Act, 1887, and the discretion of the plaintiff is left unfettered. In I. L. R. 17 Bom. 56, which was a case of declaration and consequential relief, it was held as I have already said that the valuation of the relief sought for computing Court-fees rested with the plaintiff and not with the Court; and in other suits falling under section 7, paragraph 4, of the Court-Fees Act, 1870, the plaintiff

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was allowed to put his own value upon the reliefs claimed, and it was held that the amount paid by him also determined jurisdiction (I. L. R. 12 Bom. 675, I. L. R. 19 Bom. 198). It would seem therefore that according to those decisions the amount paid by the plaintiff in a suit, in which a declaration and consequential relief is prayed for, should determine the jurisdiction; and the High Court of Calcutta has so held (I. L. R. 32 Cal. 734). But our own High Court in 8 Bom. L. R. 885 has recently held that though a suit in which declaration and consequential relief are sought is governed by section 8 of the Suits Valuation Act, 1887, the term "determinable" used in that section means "determinable by the Court which has to try the case," and I am bound to follow this decision.

Plaintiffs preferred an application under the extraordinary jurisdiction, section 622 of the Civil Procedure Code (Act XIV of 1882).

V. G. Ajinkya for the applicants (plaintiffs):—We come up in revision on the ground that the first Court, which alone had the jurisdiction to try the suit, was wrong in passing the order for the return of the plaint for presentation to the proper Court. That Court refused to exercise the jurisdiction which was vested in it to entertain the suit. Our suit is one for declaration and injunction which has been held to be a proper consequential relief. Our claim is therefore governed by section 7, sub-section (*4*), clause (*c*), of the Court-Fees Act, which lays down that the *ad valorem* Court-fee leviable in suits coming within the clause would be determined by the valuation put down by the plaintiff. Along with the said section may be considered section 8 of the Suits Valuation Act which shews that in suits falling under section 7, sub-section (*4*), clause (*c*), the valuation for Court-fees and jurisdiction would be the same. It has been ruled over and over again by this Court that the amount put by the plaintiff in a suit in which declaration and consequential reliefs are prayed for should determine the jurisdiction: *Khushalchand Mulchand* v. *Nagindas Motichand*[1], *Great Indian Peninsula Railway Company* v. *Raisett Chandmull*[2]. In the present case no rules as contemplated by section 4 of the Suits Valuation Act have been framed by Government, and so long as no rules are framed the suit would be governed by section 8 of the Act, and that section lays down that the value determinable for Court-fees and jurisdic-

(1) (1888) 12 Bom. 675. (2) (1894) 19 Bom. 165.

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tion would be the same, and as the plaintiff is the person who is to value the claim for the purposes of Court-fees, the value put down by him would determine the jurisdiction. The whole law on the point is discussed by the Calcutta High Court in *Hari Sanker Dutt* v. *Kali Kumar Patra*[1]. We therefore submit that the lower Courts wrongly held that the suit was not within the pecuniary jurisdiction of the Second Class Subordinate Judge.

M. N. Mehta for the opponents (defendants) :—We submit that though the suit is one for declaration and injunction, the plaintiff is not the sole arbiter of the valuation to be put down for determining the jurisdiction of the Court. The word "determinable" occurring in section 8 of the Suits Valuation Act would mean as determinable by the Court. The Court is not deprived of its jurisdiction to go into the question whether the value put down by the plaintiff is sufficient or not: *Boidya Nath Adya* v. *Makhan Lal Adya*[2], *Musst. Bibi Umatul* v. *Musst. Nanji Koer*[3]. There is a ruling of our Court in *Dayaram* v. *Gordhandas*[4] which lays down that the valuation to be determined under section 8 of the Suits Valuation Act should be determined by the Court, and so long as that ruling stands the lower Courts are bound to follow it. Besides, section 12 of the Suits Valuation Act gives ample power to the Court to go into the question of valuation, and in this case the Court has exercised that power and has, after taking evidence, come to the conclusion that the value of the subject-matter was over Rs. 5,000, and therefore under section 24 of Act XIV of 1869 the Court of the Second Class Subordinate Judge had no jurisdiction to entertain the suit.

Ajinkya in reply :—The case of *Boidya Nath Adya* v. *Makhan Lal Adya*[5] was for partition. The ruling in *Musst. Bibi Umatul* v. *Musst. Nanji Koer*[6] was not under the Suits Valuation Act. The case of *Dayaram* v. *Gordhandas*[7] is clearly distinguishable as in that case possession was one of the consequential reliefs asked for.

(1) (1905) 32 Cal. 734.
(2) (1890) 17 Cal. 680.
(3) (1907) 11 Cal. W. N. 705.
(4) (1906) 31 Bom. 73.
(5) (1890) 17 Cal. 680.
(6) (1907) 11 Cal. W. N. 705.
(7) (1906) 31 Bom. 73.

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SCOTT, C. J. :—The question that we have to decide is whether in a suit for a declaration and consequential relief the Court must accept the value of the relief stated in the plaint for the purpose both of the Court-fees and jurisdiction.

We think that the words of section 8 of the Suits Valuation Act VII of 1887 lead to that conclusion; and we find that this was the view taken by the Calcutta High Court in *Hari Sanker Dutt* v. *Kali Kumar Patra*[1].

We have been pressed by a decision of the Court in *Dayaram* v. *Gordhandas*[2], but that is a case which is clearly distinguishable, because the learned Judges there treated it as a suit in which there was a claim for possession.

We, therefore, make the rule absolute and set aside the order of the lower Court with costs.

Rule made absolute.

G. B. R.

(1) (1905) 32 Cal. 734. (2) (1906) 31 Bom. 73.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Chandavarkar.

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December 1.

GANESH MORESHWAR JOSHI AND ANOTHER (ORIGINAL DEFENDANTS 3 AND 4), APPELLANTS, *v.* PURSHOTTAM BALKRISHNA RODE AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 5 AND 6).*

Civil Procedure Code (Act XIV of 1882), sections 278, 282, 283 and 287—Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtor.

Plaintiffs obtained a money-decree against their debtor and in execution attached the debtor's immoveable property which was already mortgaged with possession to a third person. At the auction-sale the plaintiffs themselves purchased the property with the leave of the Court subject to the mortgage.

* Second Appeal No. 186 of 1907.

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Before the sale was confirmed and the decree was satisfied the plaintiffs having brought a suit for a declaration that the mortgage was fraudulent and without consideration it was contended that the plaintiffs were no longer judgment-creditors but purchasers and that what was attached and sold was equity of redemption, therefore, the purchasers could not claim more than they bought.

Held, that, as the suit was brought before the confirmation of the sale and the satisfaction of the decree, the plaintiffs were judgment-creditors and not purchasers.

Held further, that the plaintiffs under their purchase were not purchasers of merely the equity of redemption and were not bound by estoppels which would have bound the judgment-debtor. There is nothing to prevent such a purchaser from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgage.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Thána with appellate powers, amending the decree of G. K. Kale, Subordinate Judge of Roha

The facts of the case were as follows :—

On the 30th November 1899 the plaintiffs Ganesh Balkrishna Rode and his brothers got a money-decree against Vishnu Bapat father of the minor defendants 1 and 2 for the recovery of his money-debt, namely, Rs. 116 and costs. In execution of the decree the property in suit along with the other property of the judgment-debtor was attached in the year 1901. Thereupon defendant 3, Ganesh Moreshwar Joshi, applied to the Court for the removal of the attachment or for an order that the property be sold subject to his mortgage on the ground that the plaintiffs' judgment-debtor had mortgaged the property to him with possession for Rs. 2,000 on the 12th February 1900. On the 15th November 1902 the Court ordered that the attached property should be sold subject to the mortgage lien of defendant 3. The auction-sale took place on the 23rd October 1903 when the property in suit was purchased by plaintiffs with the leave of the Court and the sale was confirmed on the 24th November 1903. In the meanwhile, that is, after the purchase by the plaintiffs but before the sale was confirmed, the plaintiffs brought the present suit on the 13th November 1903 for a declaration that the property in suit was liable to be attached

and sold in execution of his money-decree, the mortgage of defendant 3 being a sham and colourable transaction without consideration. They further prayed that the order directing them to purchase the property subject to defendant 3's mortgage be set aside. Defendant 4 was the undivided brother of defendant 3 and defendants 5 and 6 were mortgagees of some of the properties in suit from defendant 3.

The guardian of defendants 1 and 2, who were minors, stated that he knew nothing about the claim.

Defendants 3 and 4 contended *inter alia* that their mortgage for Rs. 2,000, dated the 12th February 1900, was a genuine transaction accompanied with possession and supported by valuable consideration, that as the mortgage was passed one year before the plaintiffs' attachment it was binding on the plaintiff, that the plaintiffs' allegations were false and malicious, and that the property in dispute was not liable to attachment and sale in execution of the plaintiffs' decree so long as the mortgage was not paid off.

Defendands 5 and 6 did not appear.

The Subordinate Judge found that the mortgage in suit was not a sham transaction and was supported by consideration, that the mortgage was proved, and that the plaintiffs were not entitled to any relief. The suit was therefore dismissed.

The plaintiffs having appealed, the Appellate Court found that the mortgage was a colourable transaction without valuable consideration and that the plaintiffs' purchase at the auction-sale did not amount to an acquiescence on their part in the genuineness of the mortgage and did not estop them from praying for the declarations sought. The following is an extract from the appellate Court's judgment:—

> It is, however, clear to my mind that the fact of the plaintiffs having bid at the Court-sale and become purchasers of the plaint property with full knowledge and notice of the retention of the mortgage lien on the foot of exhibit 53 in favour of defendant No. 3 cannot and does not prejudice their right, even though they were the decree-holders at whose instance the property was put up to sale, to challenge the genuineness and *bonâ fides* of the mortgage.

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The sale of the property subject to the mortgage incumbrance was ordered by the Court in spite of the decree-holders' protest and opposition which were disallowed by the Court after a summary investigation in a miscellaneous proceeding under sections 278 to 281 of the Code of Civil Procedure. The very nature of the inquiry and the frame of the issues to be raised in it make it evident that the order passed does not finally dispose of the questions and the law clearly provides a remedy by way of a regular suit to render it nugatory and ineffectual, if not to revise and reverse it. It is of a temporary nature, and all the important questions regarding the *bonâ fides*, consideration, validity, etc., of the mortgage can be and are raised for determination in the suit by the dissatisfied party to the miscellaneous proceeding, may the aggrieved party be an intervener or the decree-holder. The order has not the effect of *res judicata* on either side, and it does not seem lawful or equitable to find that because a decree-holder abides by the Court's order for the time being, allows the attached property to be sold subject to a lien and himself purchases it, he has acquiesced in the order and is ever after estopped from impeaching the *bonâ fides* of want of consideration for the mortgage. The law leaves him open two remedies for getting the questions regarding the mortgage wholly finally tried and adjudicated on—one by a regular suit for a declaration of the nature sought in the present suit, and the other by a suit of redemption, and what would be the use and object of that suit if the party suing were to be held as bound and silenced by the result of the miscellaneous inquiry which from its very character embraces two issues, one about the possession of the property attached and the other as to on whose behalf the possession was held at the time of the attachment? The incidental inquiry into consideration, if one should be at all held, would be a summary and to determine only *primâ facie* which of the parties should be compelled to file a regular suit. Such an inquiry therefore and the Court's order in it cannot be binding on a party to the regular suit, and it is therefore that the plaintiffs cannot be held as having acquiesced in the Court's order directing the retention of lien.

They should certainly have shewn diligence and not allowed the execution matter to be pushed on to sale by instituting the suit at an earlier date and obtaining a temporary injunction prohibiting the sale under section 492, Civil Procedure Code, or a stay order in the execution matter itself. It is this supineness on their part that has placed them as purchasers in an awkward position, but it cannot tend to the conclusion that they cannot challenge the mortgage on the grounds of want of consideration and *bonâ fides*.

The appellate Court therefore passed a decree as follows:—

The question as to what relief could be awarded to the plaintiffs in this suit is not difficult to answer. Though they have succeeded in shewing that the mortgage-deed (exhibit 53) does not evidence a real and *bonâ fide* transaction they could not but admit that the property attached at their instance was at the time of its attachment subject to the mortgage of Rs. 1,000 in favour of the

Paranjpes (defendants 5 and 6) by virtue of their deed (exhibit 88). It is not in dispute that on the date of exhibit 53 the whole amount due on the foot of exhibit 88 was Rs. 1,186-1-6.

The Paranjpes have been joined as co-defendants from the beginning and they have not urged that they were entitled to more. On the contrary their deed for Rs. 4,000 (exhibit 91) contains their admission that the sum of their mortgage dues was Rs. 1,186-1-6 and not a pie more.

I therefore grant the appeal and amend the lower Court's decree. The amended decree is that it be declared that the plaint property was subject to a lien of Rs. 1,186-1-6 in favour of defendants 5 and 6 on the date of its attachment by the plaintiffs and that the mortgage of the same by exhibit 53 in favour of defendants 3 and 4 is not binding on them (plaintiffs).

Defendants 3 and 4 preferred a second appeal.

M. B. Chaubal (Government Pleader) and *G. K. Dandekar* for the appellants (defendants 3 and 4).

N. M. Samarth for respondents 1-3 (original plaintiffs).

P. P. Khare for respondents 5 and 6 (defendants 5 and 6).

SCOTT, C. J. :—The plaintiffs obtained a decree for money in the Pen Court against Vishnu Bapat, father of the defendants 1 and 2, and in execution attached *inter alia* the property described in the plaint being an eight-anna share of a *khoti* village. The defendant 3 Ganesh Joshi then applied to the Pen Court for removal of the attachment or for an order that the property be sold subject to his mortgage lien, alleging that Vishnu Bapat the judgment-debtor passed to him a mortgage with possession of the attached property on the 12th February 1900 for Rs. 2,000. The Pen Court upon that application ordered that the property be sold subject to the mortgage. This order was passed on the 15th November 1902.

The property was accordingly put up for sale subject to the mortgage and the plaintiffs with the leave of the Court became the purchasers. On the 13th November 1903 the plaintiffs brought this suit, praying that it may be declared that the deed of mortgage is without consideration and made with intent to defraud the plaintiffs and as hollow and ineffective and that therefore the property is liable to attachment and sale. The

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plaintiffs obtained a decree in the lower appellate Court. Against that decree the defendant 3 brings this second appeal.

It is contended on behalf of the appellant that the suit is not maintainable on the ground, first, that such a suit can only be brought by a person who is still a judgment-creditor and that the plaintiffs whose decree is satisfied are no longer judgment-creditors but only purchasers; and, secondly, that what was attached and sold was an equity of redemption only and that the purchasers cannot claim more than they bought.

As regards the first point it is sufficient to say that the suit was brought by the plaintiffs before the sale had been confirmed, and before the decree had been satisfied and while the plaintiffs were still judgment-creditors.

The latter branch of the argument is based upon a false assumption, for what was attached was the immoveable property believed to be unincumbered and not the equity of redemption. An equity of redemption may be attached and sold (see *Parashram Harlal* v. *Govind Ganesh*[1]) but that was not done in the present case. The claim made to the attached property was upon the investigation under section 278 decided in favour of a person claiming to be mortgagee in possession. Under these circumstances the attached property should have been released under section 280 (see *Kassirav R. Saheb Holkar* v. *Vithaldas Mangalji*[2]) and the judgment-creditors should have been left to the suit allowed by section 283. The order passed by the Pen Court was irregular, as section 282 only applies to cases of mortgages or liens created in favour of a person not in possession.

We must therefore discuss this case on the footing of a purchase at the Court-sale of attached property believed to be incumbered, a case contemplated by section 287. The purchaser under these circumstances is not bound by estoppels which would have bound the judgment-debtor. See *Dinendronath Sannial* v. *Ramkumar Ghose*[3], *Lala Parbhu Lal* v. *Mylne*[4] and *Bashi Chunder Sen* v. *Enayet Ali*[5]. There is nothing to prevent

(1) (1895) 21 Bom. 226.
(2) (1873) 10 Bom. H. C. R. 100.
(3) (1881) 7 Cal. 107.
(4) (1887) 14 Cal. 401.
(5) (1892) 20 Cal. 236.

him from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgagee.

The decision of the lower appellate Court was also attacked on the ground that the onus of proof had been wrongly thrown upon the defendant and that the finding that the mortgage was a sham transaction could not therefore stand. I, however, think it is clear that the whole of the evidence was fully discussed and considered by the lower Court. The learned Judge came to the conclusion that the surprising nature of the transaction itself and the suspicious circumstances attending it outweighed the inferences which might be suggested by the evidence of some payments having been made by the defendant to creditors of Vishnu Bapat.

It is a judgment upon a pure question of fact which is binding upon us in second appeal.

I see no reason to interfere with the decree passed by the lower Court. I would therefore confirm it and dismiss the appeal with costs.

CHANDAVARKAR, J.:—I concur.

Decree confirmed.

G. P. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

AMRITA RAVJI RAO (ORIGINAL DEFENDANT), APPELLANT, *v.* SHRIDHAR NARAYAN OKE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1908. *December 9.*

Adverse possession—Adverse possession between tenants-in-common—What constitutes adverse possession—Acts of exclusive possession—Ouster.

The property in dispute belonged jointly to two brothers G. and D. The plaintiffs obtained a decree on a mortgage-bond against D. as manager of the family, and in execution of the decree the property was sold to V. When V. sought to take possession of the property he was obstructed by G. and he had to

* Second Appeal No. 729 of 1907.

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file a suit against G. to remove the obstruction. In that suit it was held on the 29th November 1886 that V. was entitled to recover possession by partition of a moiety of the property. The application to execute this decree was sent to the Collector who on the 11th of December 1895 effected the partition and made over symbolical possession to V. of his share. This share was sold to plaintiff on the 18th March 1898. Meanwhile, on the 4th October 1894, G. sold the whole of the property to defendant's father. The plaintiff eventually sued on the 4th October 1906, to recover possession of the property from defendant: the latter contended that the claim was barred by adverse possession:—

Held, that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than 12 years before the date of the present suit) the period of his vendor G.'s possession, it must be shewn that the latter's possession was also adverse. That it could not be, so long as the decree for partition was alive and capable of execution as against G. during the period of his exclusive possession, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other.

The question of adverse possession as between tenants-in-common depends not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other.

SECOND appeal from the decision of F. X. De Souza, District Judge of Thána, reversing the decree passed by S. A. Gupte, Subordinate Judge at Murbad.

Suit to recover possession of land.

The land in dispute was originally the joint property of two brothers Gangadhar and Damodar. Of these, Damodar was sued on a mortgage-bond, as manager of the joint Hindu family, by one Narayan, the father of the plaintiffs, in 1873. The suit was decreed; in execution of the decree the property was put up for sale and purchased by one Vishnu Ganesh. When Vishnu attempted to recover possession of the property, he was obstructed by Gangadhar: and he had eventually to file a suit against the latter to remove the obstruction. The Court decided in that suit on the 29th November 1886 that Vishnu Ganesh was entitled to recover possession by partition of a moiety of the property. In execution of this decree Vishnu gave a *darkhast* to recover possession of a moiety. It was sent to the Collector for execution, who effected a partition and handed over possession of lands to Vishnu on the 11th December 1895.

On the 22nd January 1897, Vishnu sold the property to one Vinayak, who in turn sold it to the plaintiff on the 18th March 1898.

Meanwhile, on the 4th October 1894, Gangadhar sold the land to Ravji Rao (father of defendant).

The plaintiff filed this suit on the 4th October 1906 to recover possession of the property from the defendant.

The Subordinate Judge, who tried the suit, held that the plaintiff's claim was barred by time. He was of opinion that the defendant and his predecessor-in-title had been in adverse possession from the 29th of November 1886, the date of the partition-decree.

On appeal the District Judge arrived at a contrary conclusion. He held that the suit was not barred. The following were his reasons:—

The Subordinate Judge holds in the alternative that time must be held to run against the plaintiff from the date of the decree (exhibit 22), *viz.*, 29th November 1886. I am unable to follow this argument. The effect of the decree was to make plaintiff's predecessor-in-title Vishnu Ganesh, virtually a co-parcener with Gangadhar in place of Damodar, entitled to joint possession or rather a tenancy-in-common in the family property, and till the joint tenancy was severed by partition, Gangadhar's possession was joint with, and not adverse to, the decree-holder or the auction-purchaser. The adverse possession of the defendant began, if at all, from 11th December 1895, the date of partition; and computed from that date, the period falls considerably short of the statutory period.

This view is based on the assumption that Article 144 of Schedule II to the Limitation Act XV of 1877 applies to the present case, and that I think is the article applicable; but even if Article 127 or Article 137 applied, the suit would be in time; for, on the former hypothesis, the exclusion of the plaintiff would not begin till 4th October 1894, and, on the latter, the judgment-debtor would not be entitled to exclusive possession till the date of the partition.

It is thus clear that plaintiff has proved his title and that his suit is in time. But at first it seemed to me that it would be inequitable to award possession as against the defendant, who is a *bonâ fide* purchaser for value from one of the co-parceners and has been in possession by virtue of his purchase for nearly twelve years. But on more careful consideration I am of opinion that the defendant cannot be maintained in possession for the following reasons:—

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The only ground on which the defendant can resist this suit is that he has the equity of a *bonâ fide* purchaser for value without notice in his favour. But no evidence was adduced to prove that he can claim this equity in the present case. If he purchased the land with the knowledge that it formed part of an undivided co-parcenery estate, he must have known that he was purchasing what his alienor had no right to sell, and he would thus have actual notice of the defect in his title. If he purchased in ignorance, then due enquiry would have apprised him of the true character of the property he was buying, and the law would impute to him constructive notice of the flaw in his title. In either case, the equity now claimed on his behalf would be non-existent.

But even assuming that the equity can be successfully claimed, the plaintiff has an equal equity on his side, and the legal title being in him, his title must prevail. The law is settled that a purchaser from an undivided co-parcener acquires no title to specific property; he merely acquires a right to claim a partition in which he has an equity to have the family property so marshalled as to allot the specific property to the share of the co-parcener from whom he derives his title, provided this can be done without injustice to the other co-parceners (*vide Udaram* v. *Ranu*, 11 B. H. C. 76; and *Aiyyagari* v. *Aiyyagari*, I. L. R. 25 Mad. 690). In the present case, the property purchased by the defendant was not allotted to the share of his alienor Gangadhar, and it is suggested that this was due to the fraud of Gangadhar himself. Be this as it may, it has been decided that in the analogous case of a mortgage the mortgagee's sole remedy in similar circumstances is to proceed against the share which has been allotted to his mortgagor in lieu of the property mortgaged (*Byjnath* v. *Ramoodeen*, 1 I. A. 106; *Hem Chunder Thako Moni*, 20 Cal. 533; *Amolak* v. *Chandan*, 24 All. 483). By parity of reasoning, I would hold in the present case that defendant's sole remedy is to proceed against the share of Gangadhar for compensation.

The defendant appealed to the High Court.

B. V. Vidwans for the appellants:—We are entitled to tack Gangadhar's possession to our own adverse possession. Gangadhar did not hold the property on Vishnu's behalf, and the passing of the partition decree did not change the character of that possession. He was in the position of a vendor who remains in possession after the sale: such a possession has been held to be adverse to the purchaser: *Anand Coomari* v. *Ali Jamin*[1].

In the present case the *dárkhast* under which Vishnu obtained the symbolical possession was presented subsequently to our purchase, and so the *darkhast* and the granting of symbolical

(1) (1885) 11 Cal. 229.

possession do not affect us, who are third parties: see *Juggobundhu Mukerjee* v. *Ram Chunder Bysack*[1] and *Harjivan* v. *Shivram*[2].

The view of the lower appellate Court that Vishnu by his decree became virtually a co-parcener with Gangadhar and that Gangadhar's possession would not be adverse till Vishnu came to know of his ouster or exclusion is obviously not correct, because a stranger cannot become a co-parcener and cannot claim his privileges: *Ram Lakhi* v. *Durga Charan*[3].

J. R. Gharpure for the respondents:—We submit that the decree of the lower appellate Court is right. The appellant is a purchaser from Gangadhar. He will either be subject to the equities and legal defences that existed against Gangadhar or will take free from all such equities. In the former case, as Gangadhar's physical possession itself was not enough to complete his title against us, defendants claiming through him cannot be in a better position. In the latter case, if he claims independently of Gangadhar and in his own right, his possession not being for twelve years is not adverse.

None of the cases cited for the appellant apply here as they are cases before execution.

CHANDAVARKAR, J.—The facts upon which the question of adverse possession, arising on the second appeal, turns, are found and stated as follows in the judgment of the lower appellate Court:—

"The plaint-land (S. No. 17, Pot No. 1) along with other lands was originally the joint property of two brothers, Gangadhar and Damodar.

One Narayan, the father of the plaintiffs, obtained a decree in Regular Suit No. 735 of 1873 against Damodar on a mortgage-bond; and in execution of that decree, in Darkhast No. 699 of 1875, he brought the property to sale. The property was purchased by Vishnu Ganesh. The suit had been instituted by Narayan against Damodar as manager of the joint Hindu family. Gangadhar, however, obstructed the purchaser, Vishnu Ganesh, in taking possession, whereupon the latter instituted Regular Suit No. 178 of 1877 against Gangadhar to remove the obstruction. The District Court decided in appeal in that

(1) (1880) 5 Cal. 584. (2) (1894) 19 Bom. 620.
(3) (1885) 11 Cal. 680.

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suit that Vishnu Ganesh was entitled to recover possession by partition of a moiety of the property. The date of this decision was 29th November 1886 (*vide* exhibit 22).

In execution of this decree, Vishnu gave a Darkhast No. 344 of 1894 to recover possession of a moiety. The Darkhast was sent to the Collector for execution and the Huzur Surveyor, in effecting a partition, handed over to Vishnu possession of the plaint-land (Survey No. 17, Pot No. 1) and other survey numbers on 11th December 1895. Exhibit 23 is the possessory receipt passed by Vishnu in token of having obtained possession.

On 22nd January 1897 Vishnu sold the property to one Vinayak Mahadev, and he in turn sold it to plaintiff 1 on 18th March 1898 under a sale-deed (exhibit 16). That is the title-deed under which the plaintiff claims.

Meanwhile, on 4th October 1894, Gangadhar has sold the plaint-land to the defendant's father under a sale-deed (exhibit 26)."

The learned Subordinate Judge, who tried the suit, held that the plaintiff's claim was barred, because the defendant, and before him his vendor, had been in adverse possession from the 29th of November 1886, the date of the partition decree. On appeal by the plaintiff, the learned District Judge, differing from the Subordinate Judge, has held that the period commencing from the 29th of November 1886 and ending with the 11th of December 1895, when the partition was effected by the Collector in execution of the decree, should not be taken into account, because the effect of that decree was to make the plaintiffs' predecessor in title, Vishnu Ganesh, "virtually a co-parcener with Gangadhar in place of Damodhar, entitled to joint possession or rather a tenancy-in-common in the family property," and that the possession of Gangadhar could not be adverse to the decree-holder until the joint tenancy was severed by partition.

I am unable to agree with the learned District Judge, if by this he means that, where two or more persons hold property jointly as tenants-in-common and one of them is out of possession, the possession of the rest does not in any case become adverse until the property is partitioned. It has been held by a Division Bench of this Court in *Bandacharya* v. *Shriniwasacharya*[1] on the authority of Lord Denman's remarks in *Culley* v. *Doe dem Taylerson*[2],

(1) (1907) 5 Bom. L. R. 743. (2) (1840) 11 Ad. & E. 1008 at p. 1014.

followed in *Gangadhar* v. *Parashram*[1], that "to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster," and "exclusive receipt of profits continuously for a long period may point to an ouster but the Court must be satisfied that such taking of profits is an indication of a denial of rights in the other co-tenant to receive them." The question of adverse possession depends, therefore, not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other.

In the present case, the decree for partition which was obtained by Vishnu Ganesh (under whom the plaintiff claims) on the 29th of November 1886 against Gangadhar, established his right to a moiety of the property and to get that moiety separated and allotted to him. Under ordinary circumstances the continuance of Gangadhar in possession to the exclusion of Vishnu Ganesh would have been adverse from that date, and the defendant, who claims under a purchase from Gangadhar, would have been entitled to tack on the period of the latter's exclusive occupation to his own, so as to perfect his title to the property by adverse possession for more than twelve years as against Vishnu Ganesh and those claiming under him. But to entitle the defendant to add to the period of his own adverse possession (which is admittedly less than twelve years before the date of the present suit) the period of his vendor Gangadhar's possession, it must be shown that the latter's possession was also adverse. That it could not be, so long as the decree for partition was alive and capable of execution as against Gangadhar during the period of his exclusive occupation, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other. Suppose during the period that the decree was alive and capable of execution, the judgment-debtor Gangadhar, who was in possession, had repudiated his liability thereunder and claimed the property as his own. That could not have given Vishnu Ganesh

(1) (1905) 29 Bom. 300 : 7 Bom. L. R. 252.

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a fresh cause of action or the right to sue him afresh in ejectment, because, his right having been established by the decree, he could proceed in execution without any fresh suit. It is not contended before us, nor does it appear to have been urged in either of the Courts below, that on the 11th of October 1894, when Gangadhar sold the property to the defendant, the decree had been barred so as to become incapable of execution and to free Gangadhar from his liability under it. As a matter of fact, the decree was subsequently executed by the Collector according to law, with the result that, as against Gangadhar, Vishnu Ganesh was allotted his divided moiety and put in possession on the 11th of December 1895. No doubt that possession was symbolical and would not bind the defendant, who was then in actual possession under his deed of purchase of a prior date. But so far as Gangadhar was concerned, it was otherwise; his possession of the property was subject to his liability under the decree and could in no sense become adverse to the decree-holder during the period when his right to execution of the decree had not become barred. The defendant cannot, therefore, invoke the aid of the possession of his vendor to support his plea of a title acquired by adverse possession. Such possession could begin, if at all, only when Gangadhar, in spite of his liability under the decree, sold the property to the defendant, and the defendant's occupation of the land commenced. Whether, even then, the defendant's possession became adverse from that date, need not be decided, because assuming it was, the suit was brought within twelve years from then. For these reasons the decree must be confirmed with costs.

HEATON, J.—The predecessor of the plaintiff, who sues for possession, obtained a decree for possession, after partition, of the half of a property. This decree was against one Gangadhar who was in possession of the whole property and who after the partition decree, but before its execution, sold the property to the defendant and placed him in possession. So defendant was in actual possession of the whole, when partition was made in execution of the decree and plaintiff's predecessor was formally placed in possession of the half he was under the decree entitled to. Thereafter neither the plaintiff nor his predecessor converted the

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formal into actual possession and the defendant remained in actual possession of the property. The latter had not had actual possession for twelve completed years when the suit was filed but seeks to add on to his own actual possession that of Gangadhar and call the whole adverse. The facts being as they are he cannot do this. When plaintiff's predecessor executed the decree by having his share of the property separated and formally given over to him he perfected his claim.

From that moment a new condition of things came into existence; new rights arose and amongst them, that of the decree-holder to take actual possession of his separated share. This was not a right continued or derived from any previous holder of the land but a new right unlike any which previously existed. No possession prior to its inception could be adverse to that right. Therefore no case of title in the defendant based on adverse possession is established.

Decree confirmed.

R. R

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

IN RE LAND ACQUISITION ACT (ACT I OF 1894), CAUSE IN THE MATTER OF 1 GOVERNMENT OF BOMBAY, 2 KARIM TAR MAHOMED.*

1908. *June* 18.

Land Acquisition Act (I of 1894), section 18—Compensation—Mode of valuation when no recent sales—Market value—Surveyors' opinions—Objections to Surveyors' reports—Determination of value of frontage land—Building frontage, how determined—Relative value of back land and frontage—Hypothetical building scheme, value of—Value of whole land, how derived from value of part—Collector's award.

In cases where the valuation of land cannot be based on what the property was producing at the time of the notice of acquisition, and where there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood.

* Reference No. 32 of 1907.

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The owner in claiming compensation can seek to prove either what the property would fetch if sold in one block, or what is the present value if he plotted out the property and sold it in lots.

Where no evidence has been adduced of sales in the neighbourhood of such a large block of land as the one under reference the evidence before the Court of sales of small pieces of land in the neighbourhood enables the Court to give an opinion regarding the values of different portions of the block, and the value of the whole must be deduced from these. In addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary, however, to distinguish opinion from argument.

The practice which has grown up in References under the Land Acquisition Act, 1894, of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection. A surveyor's opinion by itself is good evidence.

When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the buildings in the locality.

It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of its cost; and that capital when once invested in land and buildings cannot be apportioned between them so as to give the market value of each.

It cannot be taken as a hard and fast rule that back land must be worth half the frontage land.

PER CURIAM:—"Evidence of hypothetical building schemes is irrelevant to the question of finding the market value of land. The belief that an hypothetical scheme can be a guide to market values ascertained by other means is equally fallacious."

The Court would be slow to differ from the Collector's offer on a matter of a few rupees except for very strong reasons such as an error on a question of principle.

THE facts appear in the judgment.

Kirkpatrick (with *Scott*, Advocate-General) for Government.

Robertson (with *Strangman* and *Weldon*) for the claimant.

MACLEOD, J.—This is a reference from the Collector of Bombay, under section 18 of the Land Acquisition Act, to determine the amount of compensation to be awarded to Karim Tar Mahomed for certain land on Mazagon Road, which has been notified for acquisition by Government on behalf of the Municipality of Bombay on the 17th November 1904. The land is shown in pink on the plan (Exhibit A). It measures 3,475 square yards with

a frontage of 165 feet on Mazagon Road and 148 feet on Valpakhadi Road and a mean depth of 170 feet on the Mazagon Road. At the date of the notice there was a bungalow and out-houses on the land, but it is admitted that the land should be valued as vacant building land. The Collector has offered Rs. 15 a square yard and the claimant considering his land to be worth Rs. 25, applied to the Collector for a reference to this Court.

The valuation cannot be based on what the property was producing at the time of the notice, nor have there been any recent sales of the land to guide the Court.

The market value must, therefore, be determined by sales of similar land in the neighbourhood. From Exhibit A and other evidence that has been given it is clear that small holdings are the rule in the locality. The owner in claiming compensation can seek to prove either what the property would fetch if sold in one block, or what is the present value if he plotted out the property and sold it in lots. He has not attempted the latter course. I have therefore to decide what was the market value of this plot of land as a whole on or about the 17th November 1904. No evidence has been adduced of sales in the neighbourhood of such a large block of land, but the evidence before the Court of sales of small pieces of land in the neighbourhood can enable the Court to give an opinion regarding the values of different portions of the block and the value of the whole must be deduced from these. In addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary however to distinguish opinion from argument. And the practice which has grown up in References under the Land Acquisition Act of surveyors making long reprts and providing copies to the opposite side before the hearing appears to me open to grave objection. A surveyor's opinion by itself is good evidence. What value the Court will put on it depends entirely on the effect of the cross-examination, but there is no reason why the witness should himself provide the material for his cross-examination. It will save the time of the Court if a surveyor prepares a concise description of the property to be valued, but if he is a wise man he will add nothing

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more except his opinion of its value. If however he does give his reasons they must be based on facts and not on hypothesis.

Fortunately there is no difficulty in this case in arriving at the approximate values of frontage land on Mazagon and Valpakhadi Roads in November 1904. Plots 2 to 6 on Exhibit A all front on Mazagon Road with a depth of about 80 feet. In March 1903 Nos. 4 and 5 very similar plots measuring about 78 square yards realised at auction Rs. 15 and Rs. 23 a square yard respectively. The divergence in the price cannot be explained but only demonstrates public caprice. In November 1902 plot 6 measuring 390 square yards realised at auction Rs. 21 a square yard. Plot 2 realised in August 1906 Rs. 37; and plot 3 in November 1907 Rs. 47. There is nothing to show that land value had increased between 1902 and 1904 but undoubtedly from early in 1905 prices of land began to rise owing to the boom in the mill industry, until, as Mr. Stevens said, by the end of the year almost fabulous prices were being given. This will account for the prices realised by plots 2 and 3. But sales after the date of notification must be discarded when it is proved that values have been affected one way or the other by circumstances which have arisen after that date. I have also been asked to take into consideration the amount awarded by the High Court for the property marked I on Exhibit A, but obviously I could not do so without considering all the evidence on which that award was founded. The award by itself is not evidence of the market value. Plots 8 and 9 are situated on Jail Road and though the distance from the land in reference may not be great the character of the locality is so different that the sales of those plots can be no guide in this case. When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the buildings in the locality but in an ordinary shop and chawl locality like the one I have to deal with it has been the custom for surveyors to calculate the depth at 100 feet. In the next place the value of a building frontage must depend on the higher rents that can be obtained for the shops or rooms facing the street, and as the proportion of these rents to the lower rents of the back rooms decreases so does the value of the whole frontage land decrease. As Mr. Stevens

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said, the value of frontage land with a depth of 40 feet would be 50 per cent. more valuable than if the depth were 100 feet, but the value of the 60 feet behind would decrease in greater proportion. A depth of 100 feet therefore has been admitted to give the best average and I am satisfied on the evidence that frontage land on Mazagon Road with a depth of 100 feet was not worth more than Rs. 20 a square yard in November 1904. It follows that simliar frontage land on Valpakhadi Road, a *cul-de-sac* with a nightsoil depôt at the end, would be worth less. In March 1903 plot No. 7 measuring 313 square yards was sold for Rs. 4,672 by Ahmadbhoy Habibhoy to Kassum Rahimtulla Joonas. At first the purchaser thought he was buying 242 square yards for Rs. 3,872 but on measurement the plot was found to measure 71 square yards more, and as the vendor disputed that this area had been sold, the matter was settled by an additional payment of Rs. 800. This may be regarded as an excellent instance of a bargain between a vendor who was not likely to give anything away, and a purchaser who was anxious to buy the land on account of his owning the adjoining plot.

Taking the price paid at Rs. 16 as argued by Mr. Robertson, it would be impossible to give a higher value for the Valpakhadi frontage of the land. But in spite of its triangular shape it will be seen that plot 7 with an average depth of less than 40 feet could be built on so that practically all the rooms front on the road, therefore a lower value must be given to frontage land having a depth of 100 feet. This may be partly balanced by the fact that the Valpakhadi frontage on the land in reference is more favourably situated and nearer Mazagon Road than plot 7. Its value would therefore be between Rs. 12 and Rs. 15 a square yard. With reference to the purchase of the property facing the claimant's land on the south side of Valpakhadi Road from Karmali Pirbhoy, I agree with Mr. Robertson that it cannot be relied upon, as it is a purchase of land and buildings, and the purchase price must have been fixed by what the property was producing. This cannot be taken as an instance of sale of land, though it may turn out that the balance of the purchase-money after calculating the value of the building may approximate what a witness considers to be the value of the land. That would be a coinci-

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dence and not evidence. It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of its cost and that capital when once invested in land and buildings cannot be apportioned between them so as to give the market value of each.

If I take into consideration these high values for the frontage land in valuing the whole plot I have over 1,000 square yards of land at the back as shown on Mr. Stevens' plan (Exhibit 7). If this land is to have any value, it must have access to the road and this will diminish the amount of frontage land, but I doubt very much whether the back land would have any value except as an amenity if a depth of 100 feet is allowed for frontage land. In any event if the frontage land were fully occupied a large proportion of the back land would have to be kept open. This is more probable when I consider Mr. Chambers' plan (Exhibit C) of laying out the ground, as he has taken a 40 feet frontage in order to utilise the back land to the best advantage. The purchases made by Kassum Rahimtulla Joonas of three plots of land with frontages on Chinchbunder and Valpakhadi Road in 1902 are a very fair guide to the value of ordinary chawl land in this vicinity. In 1902 Kassum bought three narrow plots adjoining each other at an average of Rs. 9-4-0 and built a chawl on them with shops on the frontages. I consider that the advantage of a double frontage was set off by the disadvantage due to the narrowness of the plots, and that it is fair to deduce from these sales that chawl land in this locality in 1902 was worth Rs. 9 or Rs. 10 a square yard provided it could be as fully built on as the land bought by Kassum Rahimtulla. Both Mr. Chambers and Mr. Stevens were of opinion that back land could be valued at one-half the value of frontage land but it is obvious that the application of this rule depends on the character of the back land.

There are two alternatives in this case, either to take a deep frontage which must have a piece of back land of very little value, or to take a lesser frontage, which while increasing the value of the back land would at the same time increase the proportion of back land to front land. But I must decline to accept as a hard and fast rule that back land must be worth

half the frontage land. That would only lead to absurdities. Mr. Robertson has argued that even accepting Mr. Stevens' division of the land as shown in Exhibit 7 the Collector's award should be increased as Mr. Stevens arrives at his all over figure of Rs. 15 by taking the plot C at Rs. 6 whereas he says in para 10 of his report (Exhibit 6) that the back land would be worth anything between Rs. 6 and Rs. 10 and the claimant should be entitled to the highest figure given by a witness on the opposite side. This is a perfectly fair argument which only illustrates the danger I have referred to above of a surveyor giving reasons in his report. However I understand Mr. Stevens to mean that the back land in this case might be worth Rs. 10 but his all over figure of Rs. 15 only allows it to be valued at Rs. 6 since if a frontage depth of 100 feet is taken, the back land becomes reduced to the lowest figure. If the frontage depth were reduced it would follow the back land might be worth up to Rs. 10. I think Rs. 6 a very full value for the back land. I regret I cannot accept Mr. Chambers' opinion that this land is worth all over Rs. 25. Mr. Chambers before the Collector valued the land at Rs. 24, solely on the basis of an hypothetical building scheme. I have already decided in an interlocutory judgment in this reference (which can be incorporated herewith) that evidence of hypothetical building schemes is irrelevant to the question of finding the market value of land. It is difficult to suppress the belief that seems to exist almost universally amongst surveyors in Bombay that market values can be ascertained in this way. Otherwise it should not be necessary to keep on giving reasons to the contrary. The belief that an hypothetical scheme can be a guide to market values ascertained by other means is equally fallacious. However much conclusions may differ, the road which leads to the determination of land values is short and straight. By the ingenuity of Counsel and surveyors attempts, often successful, are made to divert the road on the grounds that the diversions will lead to an infallible result. They only lead to waste of time.

Mr. Chambers in his report, put in before me (Exhibit B), values the land at Rs. 25. Apart from his scheme which seems to have been altered since it appeared before the Collector (another illustration of how complaisant these schemes are to the will of the

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moulder) he bases his opinion, like Mr. Stevens, on sales, but this opinion based on sales was evidently subordinate to his opinion based on his scheme. It is impossible to deduce from the evidence of sales that this large block of land could be worth anything like Rs. 25 a square yard.

Whether the depth of the frontage is taken at 40 feet and higher retail values allowed with a larger proportion of back land or the depth is taken at 100 feet and lower values allowed with a greater proportion of front land the totals come to much the same as the Collector's offer. But valuing the land as a whole it would not be correct to add up the retail values of the parts as derived from the instances of sales of small plots without making some deduction both on general principles and because the wastage must be greater than in those instances from which the retail values have been deduced. Apart from that I agree with Mr. Kirkpatrick that the Court would be slow to differ from the Collector's offer over a matter of a few rupees except for very strong reasons such as an error on a question of principle. In this reference I am satisfied that the Collector has offered the full market value of the land and I dismiss the reference with costs.

One set of costs between the Government and the Municipality to be allowed as against the claimant.

The interlocutory judgment was as follows:—

MACLEOD, J.—I have already decided this question in what I thought sufficiently plain language in the reference of *In re Dhanjibhoy Bomanji*[1] and everything I said in that judgment on this question may be taken as incorporated in this. Mr. Robertson argues that though that decision might be right in the case of a piece of land of 21,000 square yards, it would not follow that it would apply to the case of a piece of land measuring 3,500 square yards. I can see no distinction. In the first place there can be no relation between the capitalized rent of land and actual buildings and the market value of the land. It follows that there can be no relation between the capitalized imaginary rents of imaginary buildings and the market value of the land. Mr. Robertson has cited *In re Merwanji*

(1) (1907) 10 Bom. L. R. 701.

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Cama[1]. That case is not binding on me, though I would follow it if I could possibly agree with the decision. If it does decide that hypothetical building schemes are relevant, I have already expressed my view on that question in *Dhunjibhoy's case*. These hypothetical calculations are not founded on fact. There are a number of factors each of which can be varied to an indefinite extent and therefore the permutations and combinations of these factors are practically infinite. I happen to know exactly how those calculations are made and I am perfectly aware that if Mr. Chambers thought the land was worth Rs. 15 a square yard he could turn out an equally plausible scheme to support that figure. Mr. Robertson argues that if I disallow this scheme as irrelevant it follows I must hold any hypothetical building scheme is irrelevant. In my opinion it is. As long as opinions may differ as to the building to be put on a piece of ground, there can be no certain factor on which the valuation can be founded. That is the root of the matter. If the building is certain, *i. e.* one of which there cannot be two opinions, and there may possibly be cases in which it can be, then there is no longer an hypothetical building scheme. The failure to recognize this guiding principle can only result in enormous waste of time and money.

Attorney for Government :—*Mr. J. C. G. Bowen, Government Solicitor.*

Attorneys for claimant :—*Messrs. Ardeshir, Hormusji, Dinshaw & Co.*: *Messrs. Crawford, Brown & Co.*

B. N. L.

(1) (1907) 9 Bom. L. R. 1232.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1908.
July 9.

LALBHAI TRICAMLAL AND OTHERS, PLAINTIFFS, *v.* THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, DEFENDANT.*

City of Bombay Municipal Act (Bom. Act III of 1888), section 354 †—Construction—Municipal Commissioner—Power to remove dangerous structures—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house.

The primary object of section 354 of the City of Bombay Municipal Act (Bom. Act III of 1888), is the safety of the public to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the right of individuals.

The word 'appear' in the section does not involve 'appear to the eye.' It is sufficient if it appears to the Commissioner on the representation of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial, so that he must exercise his discretion in determining what action should be taken. It is not sufficient that he should merely sign a notice which was sent to him by the Executive

* Suit No. 166 of 1908.

† Section 354 of the City of Bombay Municipal Act (Bom. Act III of 1888)—*Dangerous Structures.*

354. (1) If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to or projecting from any building, wall or other structure) is in a ruinous condition, or likely to fall, or in any way dangerous to any person occupying, resorting to, or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure, to pull down, secure or repair such structure, and to prevent all cause of danger therefrom.

(2) The Commissioner may also, if he thinks fit, require the said owner or occupier, by the said notice, either forthwith or before proceeding to pull down, secure or repair the said structure, to set up a proper and sufficient hoard or fence for the protection of passers-by and other persons, with a convenient platform and handrail, if there be room enough for the same and the Commissioner shall think the same desirable, to serve as a footway for passengers outside of such hoard or fence.

Engineer because it had previously been signed by that officer. It should be considered as a notice to show cause. It is not invalid, at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right.

Danger means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first, the degree of danger must be ascertained, and then the appropriate precautionary measure prescribed. Where it is not suggested that the danger is imminent, a duty is imposed on the Commissioner to decide judicially what should be done to assure the safety of the public having due regard to the interest of the owner of the structure.

The discretion must not be arbitrary: *Paskall* v. *Passmore*(1); *Gangjibhoy* v. *The Municipal Corporation of Bombay*(2). But the Court is in the first instance entitled to inquire whether the discretion has been exercised. Discretion has to be exercised, first, in coming to the conclusion as to the state of the structure, and, then in fixing upon the appropriate remedy. It is sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued, based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken.

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *prima facie* evidence that the person appointed by the Commissioner has not exercised his discretion. The Commissioner can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains.

Under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but where there is no suggestion of imminent danger, the person affected is entitled to be heard as a matter of common justice.

SUIT for an injunction restraining the Municipal Commissioner of Bombay, his servants and agents, etc., from pulling down the plaintiffs' house under sections 354 and 488 of the City of Bombay Municipal Act (Bom. Act III of 1888), as being in a dangerous and ruinous condition.

(1) 15 Pa. St. D. 304. (2) (1899) 1 Bom. L. R. 754 at p. 764.

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LALBHAI v. THE MUNICIPAL COMMISSIONER OF BOMBAY.

The house in question consisted of a ground floor and one upper floor and was situated in Chakla Street in Bombay and faced to the west. It ran back towards the east for more than a hundred feet and on its north side was a narrow street or lane only seven or eight feet wide called Cumbharwada Cross Lane. Ten shops on the ground floor of the house opened in this lane which was a busy thoroughfare. The front of the house opening on Chakla Street only afforded a space for two shops on the ground floor. These shops, as also those opening on the lane, were used for the sale of grain and spices. The rooms on the upper floor were used for storage except four rooms which were occupied by tenants who lived in them. The whole height of the house was only fourteen or fifteen feet. The house was said to be fifty or sixty years old and was a wooden framed building, the space between the posts of the framework being filled in with masonry, chunam, etc.

The plaintiffs who were the trustees of Godiji Maharaj's temple in Bombay had purchased the said house in 1904 and they applied the rents to the maintenance of the temple.

On the 6th January 1908 the plaintiffs were served with a notice under section 354 of the City of Bombay Municipal Act which stated that a portion of their said house "was in a ruinous condition, likely to fall and dangerous to any persons occupying, resorting to, or passing by the same," and required them to pull down the whole of the first floor including the flooring and the roof. This notice came from the Municipal Executive Engineer's office and was signed by the Municipal Commissioner (the defendant).

On receipt of the said notice the plaintiffs had the house examined by their engineer who after examination reported that the house was in a sound condition and not at all ruinous or likely to fall. Thereupon the plaintiffs' solicitors, on the 1st February 1908, wrote to the Municipal Commissioner stating the result of the engineer's examination of the house and saying that they believed some mistake had been made in sending the notice. They requested that the house should be examined by the Engineering Department of the Municipality in order to ascertain its real condition. Their letter concluded as follows:—

Our clients' engineer will be glad to meet the officer of the Executive Engineer's Department, who may be deputed to inspect the house and discuss the subject with him on any day which may be appointed for the purpose.

The plaintiffs received no reply to the said letter, but on the 19th February 1908 a further notice of that date was received by them signed by an officer (an Inspector) in the Executive Engineer's Department purporting to be issued under section 488 of the City of Bombay Municipal Act and stating that on the 27th February 1908 pursuant to that section he would enter the said house with workmen in order to pull down the whole of the first floor thereof including the flooring and roof as required by the previous notice of the 6th January 1908.

The plaintiffs then had the house again examined by another surveyor who also reported it to be in a sound condition. Thereupon the plaintiffs on the 25th February 1908 filed the present suit praying for an injunction restraining the Municipal Commissioner, his servants and agents from proceeding under the aforesaid notices. An *interim* injunction pending the hearing of the suit was granted on the application of the plaintiffs.

After the plaint was filed the plaintiffs obtained inspection of the Municipal documents and discovered that for a considerable time there had been a desire on the part of the Municipal Engineering Department to remove the plaintiffs' house in order to widen Cumbharwada Cross Lane which was *much too* narrow for the traffic. The plaintiffs thereupon obtained leave to amend the plaint by adding two paragraphs, alleging that the notices of the 6th January and the 19th February 1908 had been issued capriciously and oppressively without giving the plaintiffs an opportunity of satisfying the defendant that the house was not in a dangerous condition, and that they were not issued in good faith but were really issued in order to widen the Cumbharwada Cross Lane.

The case came on for hearing in June 1908.

Issues were framed raising the following points, *viz.*:—

1. Whether the actual condition of the house on the 6th January 1908 justified the issue of the notice of that date "*to*

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pull down" part of the house as being ruinous, etc., under section 354?

2. Whether under the said section the Commissioner's order was not final and conclusive, and whether it could be questioned in a suit?

3. Whether the notices were issued in good faith?

On the second point it was contended for the plaintiffs that *in any case* both the orders were bad as both were made by the Commissioner without first giving the plaintiffs the opportunity of being heard.

Kirkpatrick (with *Setalvad* and *Bhandarkar*) for the plaintiffs:—Section 354 allows a notice to pull down only in cases of urgent and immediate danger. In other cases the notice issued under this section should be to secure or to repair. It is now six months since notices complained of were issued and the house is still standing and is occupied and used just as it always has been. This is conclusive proof that there was no urgent danger in January and February last and therefore there was no justification for the notices. The evidence given now at the hearing shows that the house though possibly needing some slight repair is quite sound and not dangerous or ruinous. The principles laid down in *Metropolitan Asylum District* v. *Hill* [1] are applicable here.

No doubt the Commissioner under section 354 may issue a notice if it appear to him that a building is dangerous. But there is nothing in the statute which takes away the right to question the propriety of his action by a suit. Section 471 recognizes that right for it speaks of any requisition *lawfully* made. How can the legality of a requisition be ascertained except by a suit? That point, however, has been decided by Jardine, J., in *Hajee Essa Hajee Fudla* v. *Charles* [2] which was a case on the corresponding section of the previous Municipal Act.

It is, of course, impossible for the Commissioner to have personal knowledge of all the matters arising in all the depart-

(1) (1881) 6 App. Cas. 193.

(2) Suit No. 225 of 1887 (unreported) referred to in Scott and Robertson on the Bombay Municipal Act, 1888, p. 122.

ments of the Municipality. He must rely on his subordinates. In their zeal to improve the City by widening the street they have misled him. The documents in evidence show their designs on the plaintiffs' house for several years previous to the notice of the 6th January 1908. The Commissioner signed that notice on the reports laid before him. In so doing he acted judicially and both sides should have been heard. But plaintiffs had no opportunity of stating their case: *Cooper* v. *Wandsworth District Board of Works* (1); *Hopkins* v. *Smethwick Local Board of Health* (2); *Attorney-General* v. *Hooper* (3). Judicial authority cannot be delegated to subordinates, see Broom's Legal Maxims, page 639, 7th edition.

Jardine (with *Weldon*) for the defendant:—Under section 354 of the City of Bombay Municipal Act the Commissioner's opinion is final and the notice issued by him in accordance with that opinion cannot be questioned in a suit unless bad faith can be shown: *Gangjibhoy* v. *Municipal Corporation of Bombay* (4); *Cheetham* v. *Mayor, &c., of Manchester* (5). So also in cases arising under section 231 of the Act, the Commissioner's opinion is conclusive: *Goverdhundas Gokuldas Tejpal* v. *The Municipal Commissioner* (6). Section 354 does not require that the person on whom notice is served shall be called on to show cause against it if he has any. Some sections of the Act do prescribe that procedure, *e. g.*, 357 clause (1), sub-clause (*b*), but no similar words appear in section 354. The omission must be intentional. See also Maxwell on Statutes, page 335, 7th edition.

The case of the Managers of the *Metropolitan Asylum District* v. *Hill* (7) only applies where the Act authorized by the statute can be done without injury to property. It is not applicable here for the acts authorized by sections 354 and 488 necessarily involve injury to property and loss to the owner of it.

We contend that the evidence shows that the condition of the house justified the issue of the notice. It was and is in a dangerous condition and ought to be pulled down.

(1) (1863) 14 C. B. N. S. 180.
(2) (1890) 24 Q. B. D. 712.
(3) [1893] 3 Ch. 483.
(4) (1899) 1 Bom. L. R. 754.
(5) (1875) L. R. 10, C. P. 249.
(6) (1890) Chitty and Patell's Small Cause Court cases, p. 281.
(7) (1881) 6 App. Cas. 193.

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The following sections of the City of Bombay Municipal Act were referred to and commented upon :—Sections 298, 336, 342, 438, 471, 489, 491 and 503.

MACLEOD, J.:—The plaintiffs as trustees of Godiji Maharaj's temple in Bombay are the owners of a house at the corner of Chakla Street and Cumbharwada Cross Lane, consisting of a ground floor and one upper floor. The rooms on the ground floor are used for shops and the rooms on the upper floor are partly used for living purposes and partly for storing goods. The gross rental is Rs. 316.

On the 6th January 1908 the plaintiffs were served with a notice from the defendant, the Municipal Commissioner for the City of Bombay (Exhibit A), requiring them, under section 354 of the City of Bombay Municipal Act, 1888, to pull down the whole of the first floor of the said house including the flooring and the roof and pull down or secure the remainder of the said structure, on the ground that the structure was in a ruinous condition, likely to fall and dangerous to any person occupying, resorting to or passing by the same. The plaintiffs in consequence of this above notice instructed their Engineer Mr. N. D. Kanga to inspect the building and he expressed the opinion that no portion of the building was dangerous or in a ruinous condition or likely to fall. The plaintiffs through their solicitors Messrs. Bhaishankar and Kanga then wrote to the defendant on the 1st February a letter (Exhibit A 3) :—

Our clients, the Trustees of the Godiji temple, in whom is vested the house No. 145 situate at Chakla Street have placed in our hands Notice No. 393 of 1907-08, dated the 6th ultimo, issued under section 354 of the City of Bombay Municipal Act, 1888, and we are instructed to state in reply that on receipt of your said notice our clients showed the same house to their engineer who after careful examination found that the said house was in quite a sound condition and was not in a ruinous condition or likely to fall down or dangerous to any person occupying, resorting to or passing by the same, and we believe that some mistake has been committed in issuing the said notice in regard to the said house.

We therefore request that you will be good enough to have the house examined by the Engineering Department of the Municipality with the view of ascertaining its real condition and our clients are satisfied that it will be found quite unnecessary to pull down the whole of the first floor

including the flooring and the roof and in the meantime oblige our clients by suspending action on the said notice.

Our clients' engineer will be glad to meet the officer of the Executive Engineer's Department who may be deputed to inspect the house and discuss the subject with him on any day which may be appointed for the purpose.

On the 17th February the defendant wrote to the plaintiffs' solicitors (Exhibit A5) forwarding the memo of the Executive Engineer. It was as follows :—

The house in question has been examined by this department and certain portions of the same having been found in an unsafe condition, a notice under section 354 of the Municipal Act has been issued for the removal of the same.

The solicitors may be informed that a month's time was given to comply with the notice which time has already expired and as their clients have done nothing in the subject, Municipality will now take further steps in the matter.

On the 19th February 1908 notice was given to the plaintiffs under the signature of Mr. A. B. Vaidya, Inspector of Streets and Buildings, B. Ward South, that he would enter on the premises at 8-30 on the 27th February to pull down the first floor as required by the notice of the 6th January. This notice is Exhibit B. The history of the notice is as follows: Mr. Katrak, Superintendent of Streets and Buildings, sent A 3 to Mr. Vaidya with a memo A 17 asking him to report. Mr. Vaidya returned it with his remarks A 4. He says: "The building was examined by the Engineering Department and the notice was issued after careful inspection." No further inspection was made by Mr. Vaidya before he reported. Mr. Katrak on getting Exhibit A 4 prepared a draft (Exhibit A 18) for Mr. Hall's, the Executive Engineer's approval. Mr. Hall approved the draft on 11th February and on the 14th Mr. Katrak gave instructions on his own responsibility to issue the notice B. It was drawn up and signed by Mr. Vaidya before the defendant replied on the 17th February by Exhibit A 5 to plaintiffs' solicitors' letter A 3, though it was not served until the 19th February. The plaintiffs then asked Mr. Chambers, the well known Architect and Surveyor, to inspect the building. He did so on the 24th February and made a report on the same day (Exhibit A 6), in which he expressed the opinion that the building was not

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dangerous or in a ruinous condition or likely to fall. The plaintiffs' solicitors then wrote to defendant on the 24th February (Exhibit A 7) forwarding a copy of Mr. Chambers' report and asking defendant to reconsider the matter, otherwise they would be obliged to file a suit for an injunction. No answer being received this suit was filed on the 25th February. On the 15th April, plaintiffs obtained an *interim* injunction restraining the defendant from pulling down or trespassing upon the premises in the plaint mentioned until the 8th May, on their undertaking not to do any work to their building. Clearly there was no imminent danger then. On the 6th May the injunction was extended for a fortnight and was finally, on the 22nd May, after considerable argument, extended to the hearing of the suit. The defendant filed his written statement on the 9th April. He says that when Exhibit A was issued it appeared to him and it still appeared to him that the condition of the upper story of plaintiffs' house was such that the said structure was dangerous to persons occupying, resorting to or passing by it, that the danger would be enhanced if the said structure were not removed before heavy rain fell, and under the above circumstances the plaintiffs were not entitled to the injunction prayed for. By an order of the 14th April 1908 the plaintiffs were allowed to amend their plaint by adding clauses 11*a* and 11*b* in which they alleged the defendant in issuing the said notice did not exercise his powers in a proper, reasonable or considerate manner and that his object was not a *bona fide* one, his real object being to acquire the property for widening Cumbharwada Cross Lane. The defendant replied to these allegations by an affidavit of the 5th May.

Before dealing with the circumstances under which the notice of the 6th January 1908 came to be issued I must refer to the previous history of the plaintiffs' house and the correspondence between the owners and the Municipality relied upon by the plaintiffs as showing the real object of the defendant in issuing the notice under section 354. The plaintiffs bought the house on the 6th October 1904. On the 8th October 1901 the previous owner had applied to the Executive Engineer of the Municipality to add a story (Exhibit C). On the 7th November 1901 the

Executive Engineer disapproved by Exhibit D on the ground that the whole of the proposed work was within the regular line of the street as shown in the plan sent therewith. On the 17th November the owner's Engineer wrote Exhibit E asking that his client should either be allowed to build or the property should be acquired by the Municipality. On the 25th March 1902 the Executive Engineer declined to entertain the proposal (Exhibit G). There was also a further objection that the building was not strong enough to bear another story. In 1905 the plaintiffs executed certain repairs within the regular line of the street without Municipal approval, and were fined Rs. 5 in the Police Court. Thereafter a notice was served on them (Exhibit H) of the 22nd July to remove the alterations. Proceedings to enforce the notice, however, were not taken as according to a minute appearing on Exhibit J the work done had been very trifling. On the 13th July 1905 the Divisional Health Officer issued a notice (Exhibit K) requiring plaintiffs to provide a privy of two seats and as plaintiffs did not comply with the requisition a summons was taken out on the 7th December (Exhibit L). On the 3rd February 1906 plaintiffs' Engineer wrote to the Health Officer (Exhibit N) stating that they had submitted plans for the privies to the Executive Engineer and asking for the summons to be withdrawn. The same day the plaintiffs submitted plans to the Executive Engineer (Exhibit O). On the 24th February 1906 the Executive Engineer wrote Exhibit Q to the Municipal Commissioner stating that as the works intended to be constructed according to the said plan were within the regular line of the street he proposed to require the building to be set back. On the same day the Executive Engineer sent a notice of disapproval (Exhibit R) to the plaintiffs. On the 19th March 1906 the Divisional Health Officer wrote Exhibit S to the Executive Engineer in respect of the summons taken out against the plaintiffs for not building the privies. By the memorandum of the 29th March (Exhibit P) prepared by Mr. Vaidya for the Executive Engineer the Divisional Health Officer was to be informed that the plaintiffs' plans for the privies could not be approved, as the whole property was intended to be acquired for the improvements of the road and

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the question of compensation was under consideration. On the 24th March the Executive Engineer reported to the Commissioner (Exhibit V) advising that the whole property should be acquired and the Commissioner's sanction was solicited. On the 29th March the Divisional Health Officer was informed that the question of set back was under consideration. The question of obtaining the set back seems to have remained in abeyance in the Commissioner's office in spite of reminders from the Executive Engineer. That Officer wrote again on the 14th November 1906 (Exhibit Z) asking for the Commissioner's early instructions. On the 29th November the Commissioner wrote Exhibit A1, in reply to Z, saying that the acquisition of the set back may be allowed to stand over until the owner of the property gives the Municipality an opportunity of taking it, and in the meantime the Health Department were to take no further action in the matter of privy accommodation. While this correspondence was going on there was no suggestion whatever that plaintiffs' house was in a dangerous condition. On the 29th November 1907 Mr. Vaidya, Inspector, and Mr. Katrak, Superintendent of Streets and Buildings for this ward, were on a round of inspection. To the north of plaintiffs' house one Harichand Kapurchand was erecting a building with a ground floor and three upper floors, and the erection of this building had to be supervised by the Municipal officers. Mr. Vaidya said that he and Mr. Katrak were passing down Coombharwada Cross Lane when he drew Mr. Katrak's attention to the way in which plaintiffs' house leaned over towards the north. Thereupon they both went into plaintiffs' house and after inspecting it Mr. Katrak gave the witness instructions to examine the house more in detail and report to him Mr. Katrak said that he and the Inspector while looking out from Harichand's house noticed the lean over of plaintiffs' house, but it is not very material from where the lean over was first noticed, though I do not think that Mr. Katrak could have seen anything more than the roof of plaintiffs' house from Harichand's window. Mr. Vaidya examined the plaintiffs' house on the 6th and 9th December making rough notes of the result of his inspections (Exhibit 5). He reported to Mr. Katrak and they both visited the house on the 11th December.

Mr. Vaidya brought his rough notes and a form of report marked A2 in which he had filled in the Inspector's remark column with a summary of his rough notes. Mr. Katrak then filled in the Superintendent's remark column in pencil and also the directions on the second sheet for the Notice Clerk. The two sheets were then returned to Mr. Vaidya to get the notice drawn up. The report and the notice were afterwards sent by Mr. Vaidya to Mr. Katrak who initialled the notice and forwarded the papers to Mr. Hall, the Executive Engineer. Mr. Hall signed the notice and sent it alone to the defendant. Defendant signed the notice and a duplicate copy was served on the plaintiffs on the 6th January. Before that they had no notice that their house was being inspected by the Municipal Officers. It is not suggested that either the defendant or Mr. Hall had seen the house or formed any opinion of their own regarding its condition before the suit was filed. Defendant signed the notice because he relied on Mr. Hall's signature and Mr. Hall signed it because he relied on Mr. Katrak's initials.

The third issue deals with the defendant's contention that this notice is conclusive unless the plaintiffs can prove *mala fides*. It is not suggested by the plaintiffs that there is any *mala fides* on the part of the defendant personally but they contended in their plaint as originally framed that they were entitled to show that the condition of their house was not such as to warrant the issue of the notice, and that if they succeeded in doing that they were entitled to the injunction, as it could not possibly have appeared to the defendant that the house was in a dangerous condition or likely to fall. It could well be implied from this that plaintiffs had raised the question whether the defendant had exercised the powers vested in him under the said section in a proper, reasonable and considerate manner or whether he had acted capriciously or arbitrarily. After inspection of the defendant's documents it seemed probable to the plaintiffs that the notice was issued owing to a desire on the part of the defendant to acquire their property for the purpose of widening Coombharwada Cross Lane. They therefore applied for and obtained leave to amend their plaint by adding two clauses definitely raising these questions:

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(1) Whether the defendant had exercised his powers in a proper, reasonable and considerate manner and not capriciously or arbitrarily ?

(2) Whether the defendant had been actuated by an improper motive ?

Section 354 of the Municipal Act of 1888 is the only section under which the Commissioner can act in respect of buildings in a ruinous and dangerous condition. It is headed—"*Dangerous structures.*"

Sub-section (1) is as follows :—

If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to, or projecting from, any building, wall or other structure) is in a ruinous condition, or likely to fall, or in any way dangerous to any person occupying, resorting to, or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice, require the owner or occupier of such structure, to pull down, secure or repair such structure, and to prevent all cause of danger therefrom.

The primary object of the section is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the rights of individuals.

In the first place it must appear to the Commissioner that a structure is in a ruinous condition or likely to fall or in any way dangerous to any person occupying, resorting to, or passing by such structure. Then the Commissioner may by written notice require the owner or occupier to pull down, secure or repair. It is admitted that the word 'appear' need not involve 'appear to the eye'. It is sufficient if it appears to the Commissioner on the representations of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial, so that he must exercise his discretion in determining what action should be taken. In this case the Commissioner merely signed the notice which was sent to him by the Executive Engineer because it had previously been signed by that officer. The Commissioner on the strength of that signature concluded that a proper decision had been arrived at as regards the house. From 400 to 500 of these notices are issued

every year and it is obviously impossible for the Commissioner to do more than trust to the discretion of his subordinates, but it is only by aid of a fiction that it can be said a notice signed in this way by the Commissioner complies with the section. It should be considered as a notice to show cause. It is not invalid; at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right. The Executive Engineer signed the notice because it was initialled by Mr. Katrak. It is not contended that Mr. Hall ever considered whether the requisition in the notice was the proper one under the circumstances. Neither the defendant nor Mr. Hall had seen the premises before the suit was filed. It is further admitted that Mr. Katrak was alone responsible for the framing of the notice and that he never considered whether the injury apprehended from the dangerous condition of the structure might not be prevented by securing or repairing the structure instead of pulling it down. There may of course be cases in which the danger is so imminent that the only obvious requisition to make on the owner is to pull down, in others the danger may be averted by less stringent measures.

Now danger means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first the degree of danger must be ascertained, and then the appropriate precautionary measure prescribed. It is not suggested in this case that the danger was imminent; up to the end of the hearing no hoarding has been put up round the building, nor have the tenants been warned to vacate, and therefore a duty was imposed on the defendant to decide judicially what should be done to assure the safety of the public, having due regard to the interests of the owner. The time for exercising his discretion personally arrived when the plaintiffs complained against the notice. It was certainly very unfortunate that no attempt was made to meet the very reasonable request made in the last two paragraphs of plaintiffs solicitors' letter of the 1st February 1908 (Exhibit A3). The letter

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came down to Mr. Vaidya for report. He did not go to examine the house again; the only question he considered was whether the notice was issued against the plaintiffs' house by mistake instead of against some other house, and he reported there was no mistake. That may have been all that was necessary for Mr. Vaidya to do, but nothing can excuse the neglect of the defendant to deal with plaintiffs' request for an opportunity to be heard on the question whether the notice to pull down was necessary. I do not imagine the defendant was personally to blame for this, as from the endorsement on A3 it appears to have been dealt with by his assistant; the fault lay with the Executive Engineer's Department. Legally, however, it affects the discretion of the defendant.

Discretion must not be arbitrary. "The very term itself standing and unsupported by circumstances imports the exercise of judgment, wisdom and skill as contradistinguished from unthinking folly, heady violence or rash injustice." See *Paskall* v. *Passmore* [1]. Mr. Jardine relied on the remarks of Jenkins, C. J., in *Gangjibhoy* v. *The Municipal Corporation of Bombay* [2]. "The Legistature has in the view I take of the Act vested in the Municipal Commissioner a discretion in this matter and the Court would not interfere in his exercise merely because the object in view might be carried out in some other way nor would it lightly impute to him bad faith." I entirely agree; but in the first instance the Court is entitled to inquire whether the discretion has been exercised. This brings me to the question raised by Mr. Kirkpatrick whether the Commissioner having to exercise his discretion can do so through an agent. Discretion has to be exercised, first, in coming to a conclusion as to the state of the structure, and then in fixing upon the appropriate remely. It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore in my opinion it is a sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person it is open to the

(1) 15 Pa. St. D. 301.

(2) (1899) 1 Bom. L. R. 754 at p. 764.

owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken. Otherwise the owner has no remedy. The Commissioner has only to say: "I have appointed a competent person to report to me; that person reported the structure was dangerous and must be pulled down. I issued a notice accordingly and you cannot dispute it."

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *primâ facie* evidence that the person appointed by the Commissioner had not exercised his discretion. When the Commissioner has perforce to act on advice of his expert advisers it must be proved that they decided judicially what advise they should offer. If they did not, the provisions of the section have not been complied with. In other words, the Commissioner can exercise his discretion through an agent, but it follows that if the agent has not exereised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains.

The case of *Cheetham* v. *Mayor, &c., of Manchester*[1] does not assist the defendant. In that case the defendant acted in alleged execution of powers given them by an Act of Parliament 30 Viet. c. 36. Under section 38 of that Act if the City Surveyor certified in writing that there was imminent danger from any building the Corporation was bound without notice to cause the same to be taken down or repaired or secured. The City Surveyor certified that there was imminent danger from plaintiff's building. The Corporation directed the surveyor to pull down, secure or repair the building as he should think fit. The Surveyor then informed the plaintiff of the directions given to him and proposed that the plaintiff should pull down his front wall. The plaintiff refused. The Surveyor then did the work himself. It was held that the certificate of the Surveyor was conclusive. Keating, J., says:—

"The provision in s. 38 is, no doubt, a very stringent one, vesting in the surveyor, as it does, absolute power to say that a man's house shall be

(1) (1875) L. R. 10 C. P. 249.

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pulled down. The legislature, however, appears to have thought it necessary to confer upon him the power; and it is our business to see that their intention is carried out."

It will be seen that section 38 of 30 Vict. c. 36 only dealt with cases of imminent danger. Sections 58 and 59 of the Manchester Police Act of 1844 prescribed the measures to be taken by the Council of the Borough in the case of ruinous and dangerous houses. Such premises had to be regularly and lawfully proceeded against by presentment of the grand jury at the Sessions. On presentment the Council could have the premises surveyed and a notice served on the owner. The powers given by the Legislature in section 38 of 30 Vict c. 36 being of a totally different nature to the powers given by section 354 of the Municipal Act, the decision in the case referred to cannot be considered as an authority in this case.

On the other hand, Mr. Kirkpatrick relied on *Cooper* v. *The Wandsworth Board of Works*(1). The 76th section of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, empowered the District Board to alter or demolish a house where a builder had neglected to give notice of his intention to build. Plaintiff began to build without giving notice. The defendants then entered and pulled down the building. It was held the defendants were bound to give the plaintiff an opportunity of being heard before demolishing the building. Willes, J., says (at p. 190):—

"I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice."

Byles, J., says (at p. 194):—

"It seems to me that the Board are wrong, whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with *Dr. Bentley's case*(2) and ending with some very recent cases, establish, that, although there are no positive words in a statute requiring that the party should be heard, yet the justice of the common law will supply the omission of the legislature."

(1) (1863) 14 C. B. N. S. 180.

(2) *The King* v. *The Chancellor, &c., of Cambridge*, 1 Str. 557.

Though the facts were different the above principles seem to be of present application. No doubt under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but in the case before me where there is no suggestion of imminent danger, the plaintiffs were entitled to be heard as a matter of common justice.

In *Vestry of St. James and St. John, Clerkenwell* v. *Feary*(1) Lord Coleridge, C. J., agreed that *Cooper* v. *Wandsworth Board of Works*(2) was an authority for the proposition that an opportunity should be given of questioning the propriety of the order made by the vestry.

The case of *Hajee Essa Hajee Fudla* v. *Charles*(3) was a suit filed in this Court against the Municipal Commissioner of Bombay for acting under the powers vested in him by section 200 of the Bombay Municipal Act, 1872. That section, which corresponded with section 354 of the present Act, enacted :

"If any house be deemed by the Commissioner to be dangerous he shall immediately if it appears to him necessary cause a fence to be put up and cause notice to be given to pull down, secure or repair, etc."

The Court came to the conclusion that the plaintiffs' house was in a dangerous condition, but it was argued the notice was bad since the Commissioner should have exercised a judgment of his own instead of relying on a report of a subordinate. Jardine, J., in an unreported judgment held that the Municipal Act did not deprive any person injured by an improper exercise of authority under section 200 of the ordinary remedy by suit. The Commissioner had to appear and plead his authority and it might be had to justify his act. The Commissioner should examine the circumstances of the particular case in order to see whether the defence was made out. The Commissioner was entitled to act under section 200 on the report of an Inspector of Buildings and did not act indiscreetly in relying on the Inspector's statement about plaintiff's building, *although it was easy to imagine cases of greater complexity when an officer entrusted with those great powers*

(1) (1890) 24 Q. B. D. 703 at p. 709.
(2) (1863) 14 C. B. N. S. 180.
(3) O. C. J. Suit No. 225 of 1887 (Unreported).

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would, if he used proper discretion, take other and more experienced advice, or make further inquiry or hear the owner of the property more fully, unless the emergency admitted of no delay whatever.

The remarks of the learned Judge which I have italicized above can well be applied to this case. In the first place the words 'hear the owner more fully' imply that the owner had a right to be heard in any case. Even then the owner should have in cases of greater complexity a further opportunity of being heard, and a failure by the Commissioner to hear him would be a failure to exercise proper discretion.

There was no doubt, however, in that case that the Inspector's report was correct, the plaintiff had had a previous notice to pull down ten months before he had been heard, the Municipal authorities had been willing to allow him to adopt preventive measures, and it was only when those had failed that a second notice was served.

Mr. Kirkpatrick further relied on section 471 of the Municipal Act 1888 which provides for the penalties to be executed against anyone who fails to comply with any requisition lawfully made under the sections therein referred to, as showing that a person on whom such a requisition is made is entitled to prove that requisition was not made lawfully, *i. e.*, in accordance with the conditions prescribed by the legislature and that therefore the notice could not be conclusive. Mr. Jardine, on the other hand, wished to confine the word 'lawfully' to procedure in drawing up and issuing the notice. Nothing regarding procedure appears in section 354 and the notice to enter under section 488 stands on a different footing. I think that Mr. Kirkpatrick's argument is correct, and that a person proceeded against under section 471 would be entitled to show that the provisions of the Act had not been complied with, otherwise the word 'lawfully' is without meaning and unnecessary. I do not think anything that I have said is calculated to hamper the action of the Commissioner under section 354. The legislature has not given him absolute powers, and whether the danger is imminent or not it is impossible to dispute the justice of allowing an owner to be

heard on the question as to what steps should be taken to secure the safety of the public. In cases where the danger is certified as imminent, there would be little chance of his getting an injunction, but in a case like the present if he can get an injunction he may succeed in saving his property, otherwise he can only assert his claim to damages.

The actual condition of the plaintiffs' house at the date of the notice is then a question of fact which must be decided. In dealing with this it is necessary to distinguish between the evidence of examination made before and after suit filed, namely, the 25th February. After the 11th December 1907 no one examined it on behalf of the defendant till the 27th February. Between the 6th January and 25th February Mr. Kanga and Mr. Chambers examined it on plaintiffs' behalf. It is admitted that the whole of the upper floor leans over from the south to north. Nearly all the posts have been plumbed by both parties and the results obtained by the plaintiffs and defendants' Engineers respectively appear in Exhibit A13 in parallel columns. I have no hesitation in placing more reliance on the results obtained by Messrs. Chambers, Stevens and Kanga for the plaintiffs. There have been too many indications throughout the case of the inclination of Mr. Vaidya and Mr. Katrak to exaggerate, to enable me to place implicit reliance on their calculations. In plumbing, nothing can be easier than to miscalculate half an inch or so, and it is certain that most of the wood in the building was put in undressed so that accurate plumbing would be in some cases impossible. Mr. Chambers refers to some of these in Exhibit A13. Mr. Vaidya and Mr. Katrak have not allowed for this. Then it appeared that the plan to be annexed to Mr. Hall's affidavit of the 16th March (Exhibit 9) was prepared by Mr. Vaidya and passed by Mr. Katrak. Defendant strenuously opposed the granting of the *interim* injunction and Mr. Vaidya knew the plan was wanted to support the defendant's case in Court. It is always difficult to come to a satisfactory conclusion on questions of fact when all the evidence is on affidavits, but a drawing carries far more conviction than pages of affidavit, and the section appearing on the plan must have been intended to give the Court a correct idea of the dangerous

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condition of the building. The ground plan by itself could not give that idea. If the injunction had not been granted, the house would have been pulled down and the relief sought by the suit would have become unobtainable. The plaintiffs' case thus hanging in the balance, the Executive Engineer, whose opinion would necessarily carry very great weight with the Court, advising the pulling down of the first floor, there is shown to the Court a section of the building which can only be described as most misleading. Yet in Exhibit 6 dated the 6th March Mr. Vaidya affirms that the plan was correct and the figures therein showing the extent of the lean over were correct. In Exhibit 2 of the same date Mr. Katrak swears he has satisfied himself of the correctness of the plan. Mr. Hall also says in his affidavit on the 16th March he believes the plan to be correct. Whether or not it was intentionally prepared in order to mislead the Court, there was certainly culpable negligence. No reasonable man comparing the correct and false sections could possbly come to any other conclusion. Nor is it clear why the plan was annexed to Mr. Hall's affidavit instead of to the affidavit of Mr. Vaidya who prepared it, unless it was considered that it would thereby carry more weight. The verandah post is said to be 4½″ out of plumb 1½″ more than any other post on that line and 2″ more than the posts to the east and west of it. Mr. Chambers plumbed it 3″ out and remarked in A 13:—"This post is roughly squared out of a bent piece of timber of the shape in which it grew and therefore it is almost impossible to plumb it accurately." This is confirmed by reference to two of the photographs annexed to Exhibit 3. The post is clearly visible, and appears to incline outwards more from the top of the railing than from the floor level. The scale of the section is very small, 8′ to an inch, and the lean over is much exaggerated. How much it is difficult to say, but Mr. Chambers and Mr. Stevens in Exhibit A 12, para 4, say that the posts said to be leaning about 3″ towards the north are plotted as if they were 6″ towards that side. The answer to this in Exhibit 3, para 4, is somewhat ingenuous though practically admitting the exaggeration :—

In answer to para 4 of the joint affidavit of Messrs. Chambers and Stevens we refer to the plan itself (plan A) which in every case clearly

shows in figures the actual extent of "lean over" of the posts and wall, when plumbed, and the section shows the height in which such "lean over" occurs so that even if the slope is not plotted with strict accuracy no one who understands a plan can possibly be misled by plan A as to facts.

The centre post on the ground floor is omitted and also the post on the first floor between the south wall and the centre post. Apart from omissions and exaggeration it is not a fair average section. The attempts made by Mr. Vaidya and Mr. Katrak in their affidavit of the 5th May (Exhibit 3) to justify that section only aggravated the offence, especially as correct sections appeared in the plan annexed to the same affidavit. It was suggested the post on the ground floor was omitted because it was only necessary to show the condition of the upper floor but the plaintiffs were required to remove the joists which, it was alleged, had sagged and those would rest on the beams. Obviously these beams would afford more support to the joists if there were centre posts on the ground floor. They say the post is left out on the upper floor because it had not been plumbed—a very insufficient reason. Again, the plan showed one post, Gf, leaning over 10". I am satisfied that though there was a slight lean over to the north the lean over of 10" was in the same direction as the ridge of the roof in order to meet a joint in the ridge which did not correspond with the posts in the partition. Afterwards it was discovered that this post was fixed in the ground and came through the floor. Mr. Hall then admitted it was a source of strength and not a sign of danger. Lastly, the allegation that in one room there was a separation between the south wall and the floor proved to be absolutely without foundation.

I have dealt with the matter at considerable length, first, because on the strength of those affidavits of the 16th March the Court was asked to decline to take the responsibility of ordering the building to remain standing, and thereby in effect to dismiss the suit, and secondly, because to swear a plan as correct which as a matter of fact is incorrect in a very material way seems perilously near to giving false evidence. In any event it must have a bearing on the evidence of Mr. Vaidya and Mr. Katrak given in Court, and the attitude adopted by the Executive

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Engineer's Department throughout the case. But all discussion regarding the lean over, whether it was original, or began subsequent to the completion of the building, or was caused by the thrust of the roof, and whether it was due to the lean over that the building should be considered, in a dangerous condition, became unnecessary when Mr. Hall admitted that the building as it existed might continue to exist for years in spite of the lean over if the timbers were sound. The main question therefore is whether the timber was reasonably sound, that is to say, so sound that there could be no danger of its being likely to give way and so carry the whole of the upper floor with it. On the 29th November 1907 when Mr. Katrak first visited the building he came to no conclusion about its condition, he only instructed Mr. Vaidya to examine it. It is certainly remarkable that Mr. Katrak had entirely forgotton this visit until reminded of it by Mr. Vaidya after his examination by Mr. Jardine had been closed. In para 2 of his affidavit (Exhibit 2) Mr. Katrak says nothing about this visit and in para 2 of his affidavit (Exhibit 6) Mr. Vaidya says he has read para 2 of Mr. Katrak's affidavit and it was correct. Mr. Vaidya visited the house on the 6th and 9th December owing to Mr. Katrak's instructions and made very full notes of his inspection (Exhibit 5) and yet nothing is said in the affidavit about these visits nor were those notes disclosed. Mr. Vaidya said his remarks on A 2 were a summary of his notes. As regards the condition of the timber he says in those notes (Exhibit 5)—"*ground floor*—rotten joists are marked on spot as also the portion of beams. *First floor*—the rotten rafters are marked on spot and are unsound." This is summarized in A2 as follows—"The joists of flooring are rotten in places as also the rafters."

No doubt in Exhibit 5 there is a rough ground plan with some posts marked as decayed, but nothing is said about them in the remarks, so their condition could not have been considered as affecting the stability of the structure.

Mr. Katrak's remarks are as follows:—"Many rafters are rotten. The joists of flooring of the room of the first floor

have sagged". In the evidence before me, there is nothing to show the joists are rotten. Mr. Katrak said he noticed decay in a few places, but nothing sufficient to cause a remark to be recorded, so he only said they had sagged. The notice to pull down was issued therefore because the walls had become out of plumb, many rafters were rotten and the joists had sagged. I may remark here it is difficult to imagine how Mr. Katrak came to record in A2 the south wall was 3 or 4 inches out of plumb in 4 feet height when the wall was 5' 6" high.

It has not been suggested that Mr. Katrak ever considered whether the building could not be repaired. For the above reasons he practically condemned the whole structure, as the ground floor was useless without the joists and flooring and nothing could be done in the way of reconstruction without the leave of the defendant. It is clear that this need not have been given and that defendant might have acquired the whole property under section 293. If therefore plaintiff had complied with the notice they would have lost the whole of their building and would only have been paid the value of the land. The rents they were getting from the building were extremely profitable and there would be a great difference between the value of the property as a rent bearing concern and the value of the land vacant as estimated by Mr. Hall in his memo to the Commissioner. Before the suit was filed Mr. Chambers, Mr. Stevens and Mr. Kanga examined the building. They reported generally that the building in their opinion was in a sound condition. It must be remembered that they had before them only the notice of the 6th January and they could not know for what particular reasons the notice had been issued. With regard to the evidence given of examinations made of the building in general and the timber in particular after suit filed it is necessary to remember that has only an indirect bearing on the question whether the notice of the 6th January was properly issued. Such evidence of defects proved to exist at the date of the notice is only relevant so far as it proves that the grounds for which Mr. Katrak condemned the building were correct; evidence of defects discovered since the suit was filed and not

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patent to Mr. Katrak when he issued the notice is irrelevant to the question whether Mr. Katrak exercised a proper discretion. On the 16th March 1907 Mr. Hall, Mr. Katrak and Mr. Vaidya made affidavits (Exhibits 9, 2 and 6) for the purpose of opposing the plaintiffs' application for injunction which I have already referred to. Mr. Hall says in para 1 of his affidavit "Much of the wood work of the said building is in a very decayed condition." Mr. Katrak says in para 2 of his affidavit "Many rafters and some of the posts and post plates were rotten." Mr. Vaidya in his affidavit merely says para 2 of Mr. Katrak's affidavit is correct. On the 1st May Mr. Chambers and Mr. Stevens reply to these affidavits. They point out the misleading nature of the section in defendant's plan and refer to a correct section on their plan annexed. In para 8 they say—"there is nothing to show that the posts supporting the roof are leaning over to a considerable extent or that the south wall leans over considerably towards the north or that the wood work of the said building is in a decayed condition." Then in para 11 they give a general opinion that the building is sound and not in a dangerous condition. This affidavit embodies practically the whole of Exhibit A 9 which is a report made by the plaintiffs' three Engineers on the 4th April. In para 10 they say: "The wood-work on the whole is sound and some of it is quite new." Messrs. Katrak and Vaidya reply to this in their affidavit of the 5th May (Exhibit 3). In para 3 they say regarding the posts, post plates and purlins, "we examined them carefully on the 15th April and found two of the post plates and two of the purlins in the gallery on the north, two of the post plates on the south wall and six of the purlins on the row of posts the subject of sub-clause (*d*) to be in a decayed condition." In para 8 (3) they say—"Finally we say as regards the wood-work seven of the posts are decayed, twelve of the purlins and post plates are decayed and upwards of eighty of the rafters are decayed." Four photos of the building taken from various positions are annexed to the affidavit.

Mr. Hall in his affidavit of the 5th May (Exhibit 10) says in para 2 that the danger due to the absence of ties between

the posts in the south wall and those in the gallery to the north was very greatly aggravated by the fact that some of the posts on which the roof rested and many of the post plates were in a decayed condition. At the hearing Mr. Chambers said in cross-examination:—"I found no decayed wood anywhere. I tried to find if there was any decayed timber as I was told the timber was rotten. If the posts and post plates were decayed that would be a source of danger; green timber has been put in, the bark has gone but the heart is sound. That was what I referred to when I said the timber was on the whole sound." On the 18th March Mr. Stevens was examined. He had visited the house the previous day and had found the post plate in the south west room had been considerably eaten by white ants. But he thought that did not affect the stability of the building. The centre of the post plate was sound. In cross-examination he admitted that he had noticed that post plate was ant-eaten on the 25th February but did not refer to it until he came into the witness box because the defendant had made no remarks about this post plate at any time during the proceedings. Further on he said—"I found no decay anywhere except in the post plate eaten by white ants and in one rafter".

Mr. Kanga was not questioned in detail about the condition of the wood. Though Mr. Katrak was examined at considerable length about the condition of the wood-work in order to reply to the evidence of plaintiffs' witness, I need only refer to the evidence of Mr. Hall who visited the premises on the 19th June with defendant's Solicitor, Mr. Crawford, with the express purpose of taking careful notes of the condition of the woodwork. These notes are Exhibit 11; and Exhibit 12 is a plan showing the timber referred to there. It is clear that the 7 posts and 12 purlins and post plates referred to in para 3 of the affidavit of Messrs. Katrak and Vaidya (Exhibit 3) as decayed do not all appear in Exhibit 12. Only two posts Bc and Fc are marked as unsound and 8 post plates.

It would have been better if the Court had first been consulted so that directions might have been given regarding the desirability of the plaintiffs having notice of Mr. Hall's visit.

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As a matter of fact they had no notice and it was therefore necessary for Mr. Chambers to inspect the building again and to give evidence in rebuttal. The notes made by Mr. Chambers appear parallel with Mr. Hall's notes in Exhibit A22. Mr. Chambers admitted he found defects on the last visit which he had not noticed on previous visits. One rafter in the verandah 5th from the east end he found absolutely rotten and had it cut away. Part of three rafters condemned by Mr. Hall had been cut off and brought into Court. These were marked A23, A24 and A25. From these Exhibits it was easy to determine where Mr. Hall and Mr. Chambers were at issue. All wood which showed signs of decay or of having been eaten by weevils or white ants was condemned by Mr. Hall as decayed or rotten without reference to the extent of the decay or the work required to be done by each particular piece condemned. Mr. Chambers admitted in most cases that the pieces referred to in Exhibit 11 are decayed to a certain extent, but in most cases he considers there is sufficient strength left in the wood to do what is required and in the case of the worst rafters, if they went the roof would still exist without them. In considering what work was required of the rafters it must be remembered that they are from 7" to 8" centre with a bearing of about 4' only. Exhibits A23 and A25 apparently had been a little eaten away on the surface by weevils, but apart from that I am satisfied they were perfectly sound. A24 was considerably decayed but still quite capable of bearing all the work that was required of it. I think therefore there was no danger to be apprehended from the condition of the rafters. As regards Bc and Fc the only two posts which Mr. Hall condemned, Mr. Chambers and Mr. Stevens said that Bc was tested by a chisel and was not decayed, the outer skin of Fc, had gone, otherwise that post was sound. If all the posts were sound, there could not be any danger of a general collapse. Mr. Chambers admitted two post plates should be replaced, namely C. D. on line A and the one in the S. W. corner. A new post plate would cost Rs. 8. Mr. Stevens said he would only replace the S. W. post plate. The objections to the other six post plates condemned by Mr. Hall were I think hypercritical.

It was also stated by defendant's witnesses that the joints of the post plates at post Gb had shifted and the joint at post Ha had opened showing that a movement was going on. Mr. Chambers in Exhibit A22 explains that what was considered by Mr. Hall to be a shifting and opening was due to the post plates being of unequal width. He did not think the joints had moved and I think his opinion must be accepted as correct.

The building is undoubtedly an old one and it could not be expected that the woodwork had not suffered from various causes. The question is had it suffered to such extent as to cause the first floor to be in such a dangerous condition when the notice was served so that plaintiffs should be compelled to pull it down. No doubt I must take into consideration that Mr. Chambers and Mr. Stevens would naturally be biassed in favour of the plaintiffs, but if they thought the building was in a dangerous condition (and from their experience they must be able to form a very reliable opinion on its condition) I am quite sure no bias would hold them from saying so. On the other hand, Messrs. Katrak and Vaidya depended mainly on the lean over when they reported the building was in a dangerous condition, and since the defendant decided to contest the suit, that report had to be supported. Evidence of every possible defect that the minutest examination could bring to light has been brought before the Court to show that the opinion formed by Mr. Katrak was correct, but I remain quite unconvinced on the evidence that on the 6th January 1908 the plaintiffs' building was in a ruinous and dangerous condition and likely to fall. Further, I fail to understand how Mr. Katrak with his experience came to the conclusion that the house was a fit subject for a notice under section 354. However, he did come to that conclusion, but I am quite satisfied that he never exercised a proper discretion in considering what form the notice should take. Fifty to hundred rupees would have covered the cost of replacing all the woodwork condemned by Mr. Hall and there was no reason whatever for issuing a notice which if executed would have caused a loss to the plaintiffs of several thousands of rupees. That can only be characterized as rank injustice. But besides contending that

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Mr. Katrak did not exercise a proper discretion, the plaintiffs have suggested that he and therefore the defendant was actuated by improper motives. Neither Mr. Sheppard nor Mr. Hall had in their minds when they signed the notice the particular structure to which it referred, but as they have adopted the decision of Mr. Katrak, the notice must stand or fall by the conduct of Mr. Katrak. It is difficult to imagine that Mr. Katrak was not perfectly well aware that plaintiffs' house was nearly all within the regular line of the street, and it is not an unreasonable inference for the plaintiffs to suggest that Mr. Katrak thought he had found a good opportunity for getting rid of a building which stood in the way of a desirable street improvement. The fact that the plaintiffs' request for a further examination in the presence of their Engineers was ignored lends further strength to their suggestion. Reading Exhibit A3 it should have occurred to Mr. Katrak that the request was a reasonable one and he ought to have advised the Executive Engineer to pay some attention to it. Mr. Sheppard said in cross-examination the plaintiffs had an opportunity of showing him there was no cause for the notice, but he had to admit in answer to the Court that his reply (Exhibit A5) gave no such opportunity to the plaintiffs.

Further, it was suggested by the plaintiffs that the projecting beams of Harichand's house were intended to support a verandah which could only be added when plaintiffs' house had been removed and that Messrs. Vaidya and Katrak were acting in collusion with Harichand in order to enable him to build his verandah. A very reasonable explanation of the projections was forthcoming, namely, that the scaffolding had to start from the plinth of the building owing to the narrowness of the street and it was necessary to have projections to which the scaffolding could be attached. The plan showing the projection of beams at the terrace to the east where no verandah could have been required supports this explanation. On the other hand, no doubt some of the projections could have been used to support a verandah and it was a curious coincidence that they should have only recently been cut away, but all this remains conjecture and nothing more. It would require very

strong evidence to satisfy me that the defendant had made up his mind several months before the notice to acquire the plaintiff's property, and that Mr. Katrak had in consequence expressly permitted Harichand to project the beams over the street for the purpose of a verandah. There are no doubt many facts in the case which strongly support the plaintiffs' suggestion of *mala fides*. At the same time the facts from which the inference of *mala fides* is sought to be drawn must be so irresistible as to admit of no other conclusion. I cannot therefore find the charge of *mala fides* proved.

A very heavy responsibility is laid upon the Court in dealing with a case of this nature but I am thankful to say that the grant of the *interim* injunction has been justified by events.

There will be a decree for the plaintiffs restraining the defendant from pulling down or attempting to pull down or trespassing upon the premises referred to in the plaint or in any way taking action under the notices of the 6th January 1908 or 19th February 1908.

The defendant must pay the plaintiffs' costs. The plaintiffs to be entitled to have the costs of one Engineer taxed as between attorney and client, the other Engineers will be entitled to a fee for preparing themselves for giving evidence and the usual charges.

Attorneys for the plaintiffs: *Messrs. Bhaishankar, Kanga and Girdharlal.*

Attorneys for the defendant: *Messrs. Crawford, Brown & Co.*

G. P. R.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1903. *September* 11.

KEDARMAL BHARAMAL, APPELLANT AND PLAINTIFF, *v.* SURAJMAL GOVINDRAM, RESPONDENT AND DEFENDANT. *

Pakki Adat agency—Place of performance of contract by Pakki Adatya—Custom—Jurisdiction.

K., a Bombay merchant, employed S. as his agent at Akola on the *pakki adat* system. On K.'s instructions S. entered as his agent into certain contracts at Akola. On an ageney account being taken a sum of money was found to be due from S. to K. On K. suing for this sum S. pleaded that the High Court at Bombay had no jurisdiction to hear the suit on the ground that no part of the cause of action had arisen in Bombay.

Held, in the case of *Pakki Adat* agency primarily the place of payment is the place where the constituent resides, but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit.

Per CHANDAVARKAR, *J.*—A pakki adatya's liability ceases when hard cash has come into the hands of his constituent.

THE plaintiff was a merchant and a constituent in Bombay. The defendant was the plaintiff's agent at Akola on *pakki adat* system. Under instructions and directions from the plaintiff the defendant transacted at Akola certain *sodas* (contracts) for the forward sale of *jowári* for the Vaida of Falgun Sud 15th, Samvat 1959 (13th March 1903). The defendant also did business for the plaintiff in cotton, cotton seeds and hundies. In the case of cotton, ready cotton was purchased at Akola, and forwarded to the plaintiff in Bombay.

The defendant remitted cash to Ujjain from Akola on the plaintiff's account for which he subsequently drew hundies on the plaintiff at Bombay which hundies the plaintiff accepted and paid in Bombay.

At the foot of the agency account there was a profit payable to the plaintiff who filed this suit for the recovery thereof and for the agency account. As the defendant resided out of

* Suit No. 57 of 1903. Appeal No. 1490.

Bombay the leave of the Court was obtained under clause 12 of the Letters Patent. The defendant contended in his written statement that this Court had no jurisdiction to entertain this suit as no part of the cause of action had arisen in Bombay.

After filing his written statement the defendant took out a Chamber summons, dated 31st March 1905, calling upon the plaintiff to show cause why the leave granted to him under clause 12 of the Letters Patent to institute this suit in this Court should not be revoked and in the alternative why the questions as to whether the monies, if any, due to the plaintiff were payable in Bombay and whether this Court had jurisdiction to try this suit should not be tried as preliminary issues. Affidavits were made on the summons, each party contending that according to the custom of the trade the monies were payable at his place.

Tyabji, J., who heard the summons dismissed the same following his pervious decision in *Motilal* v. *Surajmal* [1].

The defendant appealed against this decision and the appeal Court ordered the following preliminary issue to be tried :—

"Whether the monies, if any, due to the plaintiff are payable in Bombay."

Batty, J., before whom evidence on this preliminary issue was heard decided that the plaintiff had not proved the custom, that the place of payment was the place where the constituent resided, and that therefore the cause of action did not arise within the jurisdiction of this High Court.

The plaintiff appealed.

Bahadurji (with Jardine) for appellants.

We say that the onus is on defendant to establish that the monies were payable at Akola and this onus he has failed to discharge.

Batty, J., held that this onus was on us.

We say the Adatya's duty was to remit and pay in Bombay or if we directed elsewhere then to such place as we might direct.

(1) (1904) 30 Bom. 167.

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That is according to the pakki adat system : see *Bhagwandas* v. *Kanji* (1).

Payments made by Adatyas to constituents are made in three ways : by (1) hundis, (2) currency notes, (3) making credit entries in Bombay. The witnesses also agree that the constituent has to bear all the charges including the cost of remittance. If exchange is above par it is debited to the principal if below par it is credited to the principal. See Hiralal Motiram's evidence as to exchange. Interest ceases to run against the Adatya on posting remittance, the reason being that he then ceases to have the use of the money. In case the hundi is lost in transmission the Adatya sends another a Pett Hundi. If the drawee fails then the Adatya recovers from the drawer and credits the constituent with principal and interest. Batty J. seems to have thought that the above circumstances are against us and to have argued why should the principal bear the charges if the monies were payable in Bombay. Our answer is that that is the system upon which the business is carried on. The important point is that the Adatya as soon as he recovers the money holds the money as agent and as agent would be entitled to all his charges under sections 217 and 218 of the Indian Contract Act. The money is payable in Bombay and the Adatya is bound to pay elsewhere, if so desired. We have given evidence of this and the defendant has given no evidence to the contrary. From incidental charges it appears that the money was to be paid in Bombay. Defendant cannot show that the money was to be paid at Akola. See *Rein* v. *Stein* (2), *Bell & Co.* v. *Antwerp, London and Brazil Line* (3) : *Motilal* v. *Surajmal* (4).

Robertson with *Weldon* for the respondent.

We contend that the evidence shows that both parties intended that the contract should be carried out where the Adatya was. There is no obligation to pay in Bombay. They are entitled to order us to remit the money, because it is theirs, to Bombay, and we should be obliged to carry out those orders taking due precautions for safety but could they call upon us to go to Bombay and pay

(1) (1905) 30 Bom. 205.
(2) [1892] 1 Q. B. 753.
(3) [1891] 1 Q. B. 103.
(4) (1904) 30 Bom. 167.

cash there? The Akola merchants nearly all agree that the money is payable at Akola. We belong to Akola therefore how could we have understood that payment was to be made in Bombay: *Comber* v. *Leyland* [1]; *The Eider* [2]; *Fry and Co.* v. *Raggio* [3].

We cannot admit that payment was to be without application indeed we say that application was necessary. Akola currency would suggest that the contracts were to be performed at Akola. In *Hare* v. *Henty* [4] the authorities are collected about a debtor's duty to seek out his creditors.

Strangman in reply referred to *Charles Duval & Co., Limited* v. *Gans* [5].

CHANDAVARKAR, J.—The question in this case is whether the custom set up by the plaintiff is proved. The learned Judge in the Court below has held the custom not proved upon the ground that, according to the witnesses both for the plaintiff and the defendant, what is proved is that the constituent should be paid the money due to him by his *pakka adatia* at the place where he so desires. The learned Judge has also held that as the plaintiff had not given any directions on that point, no part of the cause of action arose within the jurisdiction of this Court and therefore the suit did not lie.

Now, it is to be observed at the outset that the learned Judge has to some extent misapprehended most of the evidence on the custom set up by the plaintiff. The version he has given of some of the evidence is plainly different from what the witnesses have actually said. The effect of the evidence of the witnesses both of the plaintiff and the defendent is summarized by Batty, J., as follows:—"The result of the evidence seems to be (1) that, as plaintiff admits, no place of payment was fixed by the term of the contract: (2) that the place of payment was fixed by custom: (3) that while plaintiff asserts that, according to custom, the constituent's place of business was the place of payment, most of his witnesses admit that where correspondence is silent on the point, payment must be made either where the constituent is or

(1) [1898] A. C. 524.
(2) [1893] P. 119.
(3) (1891-92) 40 W. R. 120.
(4) (1861) 30 L. J. C. P. 302 at p. 303.
(5) [1904] 2. K. B. 685.

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at any other place to which he may direct remittance to be sent: and that this is not a matter of courtsey or favour but a rule of business: (4) that the constituent always has to bear the loss or to take the benefit of exchange: (5) the Adatya's liability for interest ceases with the despatch of the hundi."

That is the way Mr. Justice Batty reads the evidence of most of the witnesses for the plaintiff.

A careful perusal of the plaintiff's witnesses has satisfied me that it is not an accurate description of what they have said. The net result of that evidence correctly read is that primarily the place of payment is the place where the constituent resides, which in the present case is Bombay, but that the payment should be made in any other place, if the constituent has chosen to give directions to that effect.

[After discussing the evidence given by different witnesses, his Lordship continued].

Upon the whole, then, I have arrived at the conclusion that the weight of the evidence is in support of the custom set up by the plaintiff. Batty J. would, I think, have come to the same conclusion if he had not misapprehended the evidence of several of the witnesses.

But it was argued that an inference to the contrary must be drawn from certain circumstances, namely, the *hundyaman* system and loss of interest on hundis in transit. I do not think that it is a necessary inference from those circumstances that they are inconsistent with the custom set up by the plaintiff. It must be remembered that the transaction we have to deal with is one between a principal and his agent. Where the latter has to remit to the former moneys which he has collected for the principal he is certainly entitled to charge all the expenses he has to incur in collecting and sending. The evidence shows that *hundyaman* is charged on that account as part of the contract. It is but reasonable that if the custom is that an up-country agent should pay to his principal in Bombay moneys collected by the former on the latter's account, the agent ought to debit the principal with charges incurred in remitting the moneys to Bombay: and that the principal should lose interest

during transit. That is also the conclusion come to by Batty, J., at the page 114 where he remarks :—"The evidence in this case shows that he undertakes to send such profits not as a debt due from himself but as proceeds realized by him on the constituent's charges, and custom recognises that he is entitled to such charges as an agent as under section 217 of the Contract Act for expenses properly incurred by him in conducting such business." If then these are the terms of the contract, we do not see how they affect the material question as regards the custom set up by the plaintiff. The learned Advocate General has however sought to bring this case within the principle of *Comber* v. *Leyland* (1). He has argued that what the evidence establishes is that the up-country *pakka adatya* has to remit the money to his constituent in Bombay and when he has remitted the money by means of a hundi, then his obligation is at an end. No doubt some of the witnesses have spoken of remittance but they were not asked whether they understood payment and remittance as synonymous expressions. It is merely speculating to suppose that they so understood, especially when we find that most of the witnesses have distinctly stated that the up-country *adatya's* liability ceases, not when he has simply remitted the money but when the money in cash is received by the constituent. One of the witnesses examined by the defendant, *viz.*, Ramanand, says (page 66) that the constituent will not give credit to the *Adatya* merely because the latter has sent a hundi for moneys due; credit will be given after the constituent has cashed and received actual payment. The effect of the evidence is to prove that the *pakka adatya's* liability ceases when hard cash has come into the hands of his constituent. That circumstance distinguishes the present case from *Comber's*.

For these reasons, I think, the decree of the Court below must be reversed and as the learned Judge in that Court disposed of the suit on a preliminary point, we must remand it for trial on the merits. Plaintiff must bear the costs of the previous hearing of the appeal and have the costs of the present appeal heard before us and the costs of the issues tried in the Court below.

(1) [1898] A. C. 524.

1908.

KEDARMAL v. SURAJMAL.

BATCHELOR, J.—I agree with my learned colleague in the order he has proposed but in deference to the arguments we have heard I think it is desirable to state my views as briefly as possible.

The only question before us is whether the money payable under this contract is payable in Bombay so that the cause of action may be said to have arisen in part within the jurisdiction.

Now it seems to me that this case is one which depends entirely upon its own evidence. What does the evidence show? Does it show that the money is payable in Bombay or does it show only that the money is payable where the principal, the creditor, elects to be paid? In my opinion it shows that the money is payable in Bombay with a discretion to the principal to select some other place for payment if he chooses to do so. [His Lordship discussed the evidence of several witnesses and continued]:—

Then it is said that inference is displaced by the circumstance that admittedly it is the principal who has to bear the charges on account of remittance and of exchange, this latter item including the item of interest. But I cannot take that view. The principal's liability for these charges, if it stood alone, would no doubt be some indication that payment was to be made at Akola, though the indication would be faint inasmuch as the Agent's authority to deduct these charges may be referred to section 217 of the Contract Act. But however that may be, in my opinion, the best answer to the argument is this, that the evidence must be considered as a whole and, so considered, it shows that by the ordinary mercantile usuage attached to this form of contract, the contract embodies both stipulations, first, that the money should be payable in Bombay, and secondly, that the Agent should be entitled to deduct these charges. I can see no reason why these two stipulations should not co-exist in the same contract if the parties are minded to combine them. And on the evidence in this case I find that that is precisely what the plaintiff and the defendant elected to do. That in my opinion is the contract which they made. Some assistance to the respondent was sought to be obtained from the use of the phrase

"Akola chalan," but the word 'chalan' means no more than currency and the Akola currency is admittedly the British currency. That being so, it seems to me that the only distinction sought to be introduced was the distinction between the British currency of Akola and the currency of the neighbouring Native State which borders upon Akola. It may be desirable just to notice the case of *Raman Chettiyar* v. *Gopalachari* (1), though it has not been cited to us. That case is distinguishable inasmuch as there the only fact in the plaintiff's favour was that he resided at Kumbakonam, and there was no evidence that the debt was payable at Kumbakonam.

For these reasons I agree in the order proposed by my learned colleague.

Attorneys for the appellant:—*Messrs. Wadia, Gandhy & Co.*

Attorneys for the respondent:—*Messrs. Dikshit, Dhunjishah and Soonderdas.*

B. N. L.

(1) [1908] 31 Mad. 223.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

RANCHHODBHAI VALLUVBHAI (ORIGINAL CLAIMANT), APPELLANT, *v.* THE COLLECTOR OF KAIRA, RESPONDENT.*

1909. *February* 1.

Bombay Civil Courts Act (XIV of 1869), section 16—Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs. 5,000—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure.

Where a claim under the provisions of the Land Acquisition Act, 1894, is heard by the Assistant Judge and the amount in dispute does not exceed Rs. 5,000 in value, the appeal lies to the District Court and not to the High Court.

Laxmi v. *Aba* (1), followed.

APPEAL from the decision of K. Barlee, Assistant Judge of Ahmedabad.

* First Appeal No. 149 of 1907.

(1) (1908) 32 Bom. 634; 10 Bom. L. R. 924.

1909.

RANCHHOD-BHAI v. COLLECTOR OF KAIRA.

The Collector of Kaira, acting under the powers conferred upon him by the Land Acquisition Act (I of 1894), compulsorily acquired 1 acre and 30 gunthas of lands belonging to the claimant, for the purpose of building a hostel for the students of the Nadiad High School.

The District Deputy Collector of Kaira, acting as Collector for the purposes of land acquisition, fixed the compensation at the rate of Rs. 1,600 per acre and awarded Rs. 2,938 to claimant for the land acquired.

The claimant claimed Rs. 4,000 per acre and applied to the Court of the Assistant Judge of Ahmedabad.

The Assistant Judge found the claim in excess not proved and confirmed the order passed by the lower Court.

The claimant appealed to the High Court.

G. S. Rao, for the appellant.

*M. B. Chauba*l, Government Pleader, for the respondent.

At the hearing, the Government Pleader raised the preliminary objection that the appeal lay to the District Court and not to the High Court.

CHANDAVARKAR, J.:—Following the ruling in *Laxmi* v. *Aba*[1], the reasoning of which applies to the facts of the present case, we must hold that no appeal lies to this Court from the order of the Assistant Judge, but that the appeal lies to the District Court. We, therefore, return the appeal for presentation to the District Court.

The respondent must have his costs of this appeal.

R. R.

(1) (1908) 32 Bom. 634; 10 Bom. L. R. 924.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar.

KRISHNAJI PANDURANG SATHE (ORIGINAL DEFENDANT), APPELLANT, *v.* GAJANAN BALVANT KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.* 1909. *February* 12.

Jurisdiction—Tipnis Pansare right—Right to levy toll on exports of paddy from foreign territory—Such a right is nibandha under Hindu law—The right is immoveable property—Suit to enforce the right in British Courts.

The plaintiff sued to recover from the defendant a certain sum of money on account of toll leviable, under a grant from the Peshwas and known as the Tipnis Pansare right, on paddy exported from the territory of the Punt Suchiv to Pen, *viâ* Umber Khind in British territory. The cause of action arose admittedly in foreign territory; but it was contended the suit lay in the British Courts because the defendant resided in British jurisdiction :—

Held, overruling the contention, that what the plaintiff claimed was an allowance granted by the Peshwa in permanence, and such an allowance, whether secured on land or not, being according to Hindu law, *nibandha*, was immoveable property.

The Collector of Thana v. *Hari Sitaram*(1), followed.

Held, further, that this immoveable property was situate, in the eye of law, in a foreign state; and that the British Court had no jurisdiction to try a suit for the determination of a right to or interest in the property, when the right was denied.

Keshav v. *Vinayak*(2), applied.

The Courts in India have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction, but that is upon the ground of a contract or some equity subsisting between the parties respecting immoveables situated out of the jurisdiction.

SECOND appeal from the decision of F. X. DeSouza, District Judge at Thana, confirming the decree passed by S. G. Kharkar, Subordinate Judge at Pen.

Suit to recover a sum of money from the defendant.

The plaintiff was the holder of a right, known as the Tipnis Pansare right, which consisted in levying a certain fee or rate

* Second Appeal No. 668 of 1907.

(1) (1882) 6 Bom. 546. (2) (1897) 23 Bom. 22.

1909.

KRISHNAJI PANDURANG v. GAJANAN BALVANT.

on all imports into and exports from the Songhad Taluka, which now forms part of the territory of Punt Suchiv of Bhor. The right in question was to levy two annas on every khandy of paddy carried from the territory of Punt Suchiv to Pen, *viâ* Umber Khind. The right was conferred on the plaintiff by the Peshwas.

The plaintiff filed this suit to recover the sum due to him in exercise of this right from the defendant.

The defendant pleaded among other things want of jurisdiction.

The Subordinate Judge held that the suit was bad for want of jurisdiction. He said as follows:—

"*Keshav* v. *Vinayak*(1) shows that suits as to rights in respect of immovable property arising in States must be filed in the Courts of the States themselves. A *varshashan* allowance was in dispute in the above suit. Hence, in the present case the right to levy fees on carts passing by a particular road is also similar to the above right of *varshashan* allowance. Hence, the present suit must be filed in the Court of Pali and not in this Court."

This finding was on appeal reversed by the lower appellate Court, and the case was remanded for trial on merits. The learned Judge remarked:—

"The ruling in *Keshav* v. *Vinayak*(1) does not apply in the case. The *varshashan* referred to therein was a charge on the revenue of a village which is clearly different from the claim in the present case where it is a fee on carts taken from one place to another. In the case referred to, the *varshashan* was to be taken from the Nizam's territory at Aurangabad. There is no such thing in this case."

In trying the case upon its merits the Subordinate Judge found the plaintiff's claim proved. His decree was, on appeal, confirmed by the lower appellate Court.

The defendant appealed to the High Court.

P. P. Khare, for the appellant:—The question involved in this case is one of *nibandha*, which is immoveable property; and, therefore, the suit ought to have been instituted in the territories of the Native State where the right is to be exercised. See *Keshav* v. *Vinayak*(1) and Dicey's Conflict of Laws, Introduction.

(1) (1897) 23 Bom. 22.

P. B. Shingne, for the respondent:—The suit is one for recovering an amount of money due in respect of a right. We do not sue to recover immoveable property, such a suit is governed by section 17 of the Civil Procedure Code of 1882.

We sue for money, and the defendant raises a question of title. In such a case the question of jurisdiction has to be decided by reference to the plaint and not by looking at the stand taken by the defendant.

CHANDAVARKAR, J.:—The action in this case was brought by the respondent to recover a certain sum of money from the appellant on account of toll leviable on paddy exported from the territory of the Punt Suchiv to Pen, viâ Umber Khind in British territory. The respondent alleged in his plaint, and it is found proved by both the Courts below, that under a grant from the Peshwas, who were the rulers at that time of the territory now owned by the Punt Suchiv, the respondent has acquired the right in that territory to levy a certain rate or cess on all imports into and exports from it. It goes by the name of the Tipnis Pansare right.

It is admitted before me that the cause of action arose in foreign territory but it is contended that the suit lies in our Courts because the defendant resides in British jurisdiction. What the respondent claims, however, is an allowance granted by the Peshwa in permanence, and such an allowance, whether secured on land or not, being, according to Hindu law, *nibandha,* has been held to be immoveable property: *The Collector of Thana* v. *Hari Sitaram*[1]. This immoveable property is situate, in the eye of law, in a foreign State, because, on the facts found, the right to levy the toll which the respondent claims is found to arise in the territory of the Punt Suchiv. To this state of facts the principle of the decision of this Court in *Keshav* v. *Vinayak*[2] applies. It was held there that a Court in British India has no jurisdiction to try a suit for the determination of a right to or interest in immoveable property situated outside British India, where the right is denied. In the present case

(1) (1882) 6 Bom. 546 at p. 559. (2) (1897) 23 Bom. 22.

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the respondent's claim has been contested by the appellant, and, though the suit is for a money claim, it is in reality a claim to immoveable property situate outside British territory.

Our Courts, no doubt, have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction but that is "upon the ground of a contract or some equity subsisting between the parties respecting immoveables situated out of the jurisdiction." See the notes to *Penn* v. *Lord Baltimore*(1). There is no contract or equity here. On the other hand, what the respondent claims and what is found on the evidence is that the ruling power of a foreign State has assigned to the respondent the right of that power to levy toll on certain articles in that territory. "The action is in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State." *Sydney Municipal Council* v. *Bull*(2).

For these reasons the decree of the Court below must be reversed and the claim rejected with costs throughout on the respondent.

Decree reversed.

R. R.

(1) 1 Wh. & Tu. L. Cas. p. 768 (7th edn.). (2) [1909] 1 K. B. 7 at p. 12.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909. *March* 15.

CHUNILAL HARICHAND GUJAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* VINAYAK ANANDRAO (ORIGINAL DEFENDANT), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 2—"Agriculturist"—Interpretation—"Earns his livelihood"—Sources of income.

In ascertaining whether a man who has two or more sources of income of which the income from agriculture is one, occupies the status of agriculturist as defined in the Dekkhan Agriculturists' Relief Act (XVII of 1879), the Court

* Appeal No. 44 of 1908, from order.

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must take into account all these sources and ascertain whether the income derived from agriculture is larger or smaller than the rest. All the sources must be taken to be the means of his livelihood and if the income from agriculture exceed the other incomes he must be deemed to be earning his livelihood principally by agriculture.

Dwarkojirav Baburav v. *Balkrishna Bhalchandra*(1) explained.

APPEAL from order passed by S. S. Wagle, First Class Subordinate Judge, A. P., at Thána, reversing the decree passed by B. D. Subnis, Subordinate Judge at Kalyán.

Proceedings in execution.

The plaintiff held a decree against the defendant. He applied to execute the decree: and in the proceedings that followed the defendant pleaded that he was an agriculturist.

The Subordinate Judge took evidence upon the point and came to the conclusion that the defendant was not an agriculturist, on the following grounds:—

It is unquestionable that defendant derives his income from agricultural sources. He was examined by the Court—and also as a witness on his own side. (Exhibits 21 to 25). He has put in assessment receipts (Exhibits 27 to 36), and examined witnesses exhibits 38 to 40. He has also put in some leases but they were not proved. The whole of the evidence on record shows that the defendant's income from agriculture amounts to Rs. 300 at the most after paying Government assessment and the expenses of cultivation; defendant himself in his deposition (Exhibit 21) not only practically admits this but that deposition further shows that his income from this source is even less. He on the other hand states that he has a ten annas share in the revenues of the Inám village of Atgaon. He has also purchased a one-anna share from another Inámdár of the same village. The revenues of the village amount to about Rs. 1,000 (Exhibits 21, 25 and 38) and the defendant admits that his income from this source amounts to Rs. 300 a year (Exhibit 21) and that he got Rs. 700 last year on account of ground-rent. His deposition (Exhibit 25) makes it clear that he derives a part of his annual income from the village ground-rent and though the amount of it is not certain yet calculating on the basis of the rent received last year, *viz.*, Rs. 700 it may safely be presumed that it amounts to at least half the amount annually on an average. Then again defendant is forced to admit that he has got tenants at Sháhápur—paying about Rs. 80 annually as rent. He no doubt says that he does not recover more than Rs. 25 or 30 out of it but this statement is not borne out by any reliable evidence on the record. Even assuming that what the applicant states in his two depositions can by itself be taken as giving a correct idea as to his income from different sources, I find nothing in them to support the applicant's contention that his income

(1) (1894) 19 Bom. 255.

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from agriculture exceeds that from other sources. I therefore hold that he is not an agriculturist within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act. I therefore find the first issue in the negative. The more delicate question as to whether any relief can be granted to the applicant when the execution proceedings are once at an end does not consequently arise; I therefore pass the following order inasmuch as defendant applicant being held not to be an agriculturist is not entitled to reliefs prayed for.

This decree was on appeal reversed by the lower appellate Court, on the following grounds :—

It appears to me that the learned Subordinate Judge has approached the consideration of this case from an erroneous point of view. He says "Even assuming that what applicant states in his two depositions can by itself be taken as giving a correct idea as to his income from different sources I find nothing in them to support the applicant's contention that his income from agriculture exceeds that from other sources. I therefore hold that he is not an agriculturist." This view cannot be supported. It is not necessary for a man claiming the status of an agriculturist under the definition in the Agriculturists' Relief Act to show that his income from agriculture exceeds his income from other sources. All that is necessary is to show that his income from agriculture is sufficient to enable him to earn his livelihood wholly or principally. He may have other sources of income and that income may be sufficient for his maintenance. But that fact will not affect the construction of the definition: *Dwarkojirav* v. *Balkrishna*(1). What we have to see is therefore not whether the judgment-debtor's income from agriculture exceeds his income from other sources, but whether the income from agriculture is sufficient for his maintenance. It is not disputed that the judgment-debtor owns lands about 40 or 45 acres situated at Adgaum, Shâhâpur and Nandgaum which are all adjoining villages. He cultivates some land (about 20 bighas) privately and has let the rest to tenants. He says that his income from these lands is about Rs. 500 to Rs. 600. He has called witnesses Nos. 38, 39 and 40. From their evidence I hold that the income from lands is about Rs. 350 to Rs. 400 a year clear of Government assessment and costs of cultivation. To this is to be added the income from grass Rs. 40 or Rs. 50. For grass may very well be classed as agricultural produce. The judgment-debtor stated that this income was sufficient for his maintenance. The decree-holder has not produced any evidence nor shown by the cross-examination of the judgment-debtor that the agricultural income is not sufficient for the maintenance of the judgment-debtor. Ordinarily this income would be sufficient to maintain a man and there is nothing to show that the judgment-debtor's style of living is other than ordinary. No doubt in the lower Court no inquiry was directed as to the amount required for the judgment-debtor's maintenance. But when the judgment-debtor stated his agricultural income and alleged in his application that he maintained himself principally by

(1) (1894) 19 Bom. 255.

agriculture it was for the decree-holder to show that agricultural income is not sufficient to maintain the judgment-debtor. The decree-holder however called no evidence. I, therefore, hold that the agricultural income is sufficient to maintain the judgment-debtor and that he is an agriculturist.

The plaintiff appealed to the High Court.

M. B. Chaubal, (Government Pleader), for the appellant.

B. V. Vidwans, for the respondent.

CHANDAVARKAR, J.—The learned Judge in the appeal Court below has misunderstood the judgment of this Court in *Dwarkojirav Baburav* v. *Balkrishna Bhalchandra*[1] in construing the word "agriculturist" as defined in the Dekkhan Agriculturists' Relief Act. He says that "it is not necessary for a man claiming the status of an agriculturist under the definition in the Agriculturists' Relief Act to show that his income from agriculture exceeds his income from other sources." That is not what was held in *Dwarkojirav Baburav* v. *Balkrishna Bhalchandra*[1]. In that case, as the facts show, when the suit was instituted the income from non-agricultural sources had become less than that from agriculture; and the Court held that that circumstance brought the plaintiff within the definition. The judgment begins by pointing out that the expression "earns his livelihood" can only mean obtains the means of maintaining himself. In ascertaining whether a man who has two or more sources of income, of which the income from agriculture is one, occupies the status of agriculturist as defined in the Act, the Court must take into account all those sources and ascertain whether the income from agriculture is larger or smaller than the rest. All the sources must be taken to be means of his livelihood, and, if the income from agriculture exceed the other incomes, he must be held to be earning his livelihood principally by agriculture. That is the interpretation which has been hitherto placed by this Court in all the cases in which this point has arisen, following *Dwarkojirav Baburav* v. *Balkrishna Bhalchandra*[1]. We reverse the decree and remand the appeal for rehearing on the merits. Costs to abide the result.

Decree reversed.

R. R.

(1) (1894) 19 Bom. 255.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.
February 3.

EMPEROR *v.* DE SYLVA.*

The Bombay A'bkári Act (Bombay Act V of 1878), sections 3 (10), 9, 43† —Cocaine—Import by sea into the Bombay Harbour—"Import," meaning of—Sea Customs Act (VIII of 1878), section 19.

Section 9 of the Bombay A'bkári Act (Bombay Act V of 1879) does not prohibit importing cocaine generally; it merely prohibits its importation unless duty has been paid.

The intention and requirement of the section in the case of articles liable to duty under the Tariff Act are that the duty shall be paid. That intention and requirement can only be contravened when reasonbale opportunity to pay the duty has been afforded and has been evaded.

The mere entry into the Bombay harbour of a ship conveying dutiable goods or merely tying it up against the dock wall is not importing goods in contravention of the obligation to pay duty.

The term "import" as used in the Bombay A'bkári Act, 1879, includes the conveying into any part of the Presidency of Bombay by sea.

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* Criminal Reference No. 129 of 1908.

† The Bombay A'bkári Act (Bombay Act V of 1878), sections 3 (10), 9, 43 run as follows:—

3 (10). "Import" and "export" include respectively the conveying into, or out of, any part of the Presidency of Bombay, from, or to, any other part of India.

9. No liquor, hemp or intoxicating drug shall be imported by land or by sea into any part of the Presidency of Bombay unless—

(*a*) it is liable to the payment of duty under the Indian Tariff Act 1894, or any other law for the time being in force relating to the duties of customs on goods imported into British India, and the duty prescribed by such law has been paid thereon; or

(*b*) such import is permitted under the power next hereinafter conferred.

* * * * * * *

43 (1) Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license, permit or pass obtained under this Act—

(*a*) imports or exports liquor, hemp or any intoxicating drug into or out of any part of the Presidency of Bombay, or

* * * * * * *

shall be punished for each such offence with fine which may extend to one thousand rupees or with imprisonment for a term which may extend to six months, or with both.

1909.

EMPEROR v. DE SYLVA.

THIS was a reference made by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The accused was charged with an offence punishable under section 43 of the Bombay A'bkári Act (Bombay Act V of 1879), inasmuch as a parcel of cocaine weighing ten pounds bearing his name and address was detected in a ship anchored in the Bombay Harbour.

The Chief Presidency Magistrate who tried the case submitted the following questions for determination by the High Court.

1. Whether the conveying of a parcel of cocaine in a ship with the intention that such cocaine shall be landed in Bombay amounts to an importation within the meaning of section 43 Bombay Act V of 1878, if the ship containing such cocaine—

(*a*) enters Bombay Harbour;

(*b*) is tied up against the Bombay Dock Wall.

2. Whether the Bombay Harbour is a part of the Bombay Presidency within the meaning of section 43, Bombay Act V of 1878.

3. Whether a person who has committed the act referred to in question (1) has a *locus penitentiæ* while the cocaine remains on board the ship and no attempt has been made to land it.

Strangman, Advocate-General, instructed by *Nicholson*, Government Solicitor, for the Crown.—The provisions of section 43 of Act V of 1878 must be read with section 9 of the same Act. Various notifications have been issued under the Sea Customs Act (VIII of 1878) prohibiting the importation of cocaine except by certain chemists and agents mentioned in the notifications. "Import" means to bring or carry from a place abroad. The word does not involve landing. Importing into Bombay Presidency is bringing into Bombay harbour whether the goods brought are landed or not. The accused committed the offence as soon as the parcel of cocaine came into the Bombay harbour.

Bombay harbour is a part of the Bombay Presidency: see Ilbert's Government of India, pp. 19, 20; Encyclopædia of the Laws of England, Vol. XII, p. 131. The whole of the harbour forms part of British India: see *Reg* v. *Elmstone*[1], *Reg* v. *Kastya Rama*[2].

(1) (1870) 7 Bom. H. C. R. Cr. C. 89 at p. 104.

(2) (1871) 8 Bom. H. C. R. Cr. C. 63 at p. 65.

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Lowndes, instructed by *Godinho*, for the accused.—If importation is complete the moment a ship comes within the limits of the Bombay harbour everyone on board the ship who has dutiable goods commits an offence under section 9 of the A'bkári Act. There can really be no importation till the person bringing dutiable goods has had an opportunity of paying duty: see *Queen-Empress* v. *Ascensao*[1]. Goods are only imported when they are landed and delivered to the importer: see *Canada Sugar Refining Company* v. *Reg.*[2]

A person may bring dutiable goods, but on finding that the duty is very heavy may never land them. In such a case he can never be said to have imported the goods because they are brought into the harbour in a ship. If importation is not complete till a person has had an opportunity to pay duties, then the question whether that person had a license for a particular kind of goods or not is immaterial. He may sell the goods to a license-holder on board the ship or he may throw them away finding the duties to be exhorbitant.

The Government Notification of 15th April 1908 does not prohibit importation of cocaine. It merely restricts its importation to certain persons. But other persons may apply for a license and import it.

Section 3 (10) of Act V of 1878 is to be read subject to section 9.

Bombay Presidency has been defined in the Bombay General Clauses Act (Bom. Act I of 1904), section 3 (7). The word 'territory' means land only. The ship bringing the cocaine was not within the territory because it was in territorial waters. The territoral limit of every State extends to three miles from the shore. The State has jurisdiction over it. But this is quite different from the 'territory' included in the expression Bombay Presidency. The Bombay A'bkári Act distinctly speaks of importation within the territory of Bombay Presideney. There is nothing to show that the Bombay Government administers the portion between the shore and the imaginary harbour line. Ilbert speaks of the Port of Bombay and not of the Harbour. There is no Act to

(1) (1890) Ratanlal's Unrep. Cr. C. 503. (2) [1898] A. C. 735.

show that Bombay harbour is under the administration of the Government of Bombay. The passage in the Encyclopædia says that territory includes harbour, ports, etc., but there is no authority referred to in support of this statement. The remarks on p. 99 in *Reg.* v. *Elmstone*[1] are merely *obiter dicta*.

Regulation II of 1827 divided Bombay Presidency into Zillas. The regulation does not speak of the sea. It excludes the sea.

Strangman in reply.—The Bombay harbour is within the Ordinary Original Civil Jurisdiction of the Bombay High Court: see *Queen* v. *Essub Ibrahim*[2]. The Bombay harbour is within the Ordinary Criminal Jurisdiction of the Bombay High Court. The Ordinary Original Civil Jurisdiction and Criminal Jurisdiction are both the same: see clauses 11 and 21 of the Letters Patent. The Government of Bombay has administered the port and harbour of Bombay, as in Bombay Act I of 1873 there are provisions dealing with the harbour. The harbour therefore forms part of the Bombay Presidency. In *Queen-Empress* v. *Ascensao*[3] the accused was fined before he had opportunity to pay duty. But in the present case the importation of cocaine is restricted under notifications issued under section 19 of the Sea Customs Act. In the former case the importation of wine was neither prohibited nor restricted. In this case no payment of duties would have entitled the accused to import the parcel. If harbour is included in the Bombay Presidency then the bringing in of cocaine into the Bombay harbour is importing into the Bombay Presidency. The liability to pay duty arises as soon as a ship arrives within the limits of the harbour, though the duty is, for the sake of convenience, levied after the goods are landed.

The Indian Tariff Act (XVI of 1875) imposes the duty. The Sea Customs Act shows how it is to be collected. The latter Act uses the words "leviable" and "payable." The duty is leviable as soon as the goods come: see sections 3 (*d*), 11, 15, 17, 20, 20 (*c*), 24, 25 27 29, 30, 32, 33, 41, 46, 53, 54, 55, 57, 80, 81, 82, 83, 85, 88, 128, 129, 131, 142, 168, 194, 196. Section 128 is

(1) (1870) 7 Bom. H. C. R. Cr. C. 89 at p. 104.

(2) (1845) Perry's O. C. 577.

(3) (1890) Ratanlal's Unrep. Cr. C. 503.

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an important one. Section 194 allows a Custom Officer to open any package and examine goods on board a ship.

Section 9 of the A'bkári Act does not restrict the meaning of import in section 43. It should be read in the light of the Sea Customs Act which came into force before the A'bkári Act. Import has a general meaning in sections 3 (10) and 43 and cannot have a restricted meaning in section 9.

Lowndes.—Harbour may be part of the Bombay Presidency but the three-mile territorial limit is not. The A'bkári Act speaks of the Indian Tariff Act but not of the Sea Customs Act. The Legislature specially refers to one and not to the other. The A'bkári Act is not therefore subject to the provisions of the Sea Customs Act.

The Privy Council has held in *Canada Sugar Refining Company* v. *Reg.*[1] that the words 'levy' and 'collect' only mean 'payable.' The word 'levied' means 'paid,' and not 'become payable.' As the A'bkári Act provides for bonded warehouses, the offence of importation is not complete until goods are landed and there was an opportunity to pay duty.

The Government Notification simply restricts the importation of cocaine until permission is obtained. It does not say that permission should be obtained even before the article is brought into the harbour. If a man is in a foreign country, for instance, it is not possible to get a permit, and if he brings cocaine in a ship and then applies to the proper authorities for license, it would be absurd to hold that he has committed an offence.

HEATON, J.:—The questions which we are asked to answer are these:—

1. Whether the conveying of a parcel of cocaine in a ship with the intention that such cocaine shall be landed in Bombay amounts to an importation within the meaning of section 43, Bombay Act V of 1878, if the ship containing such cocaine

(*a*) enters Bombay harbour,

(*b*) is tied up against the Bombay Dock wall.

[1] [1898] A. C. 735.

2. Whether the Bombay harbour is a part of the Bombay Presidency within the meaning of section 43 of Bombay Act V of 1878.

3. Whether a person who has committed the act referred to in question (1) has a *locus penitentiæ* while the cocaine remains on board the ship and no attempt has been made to land it.

The first question involves a consideration of the meaning of section 43 of Bombay Act V of 1878. That section makes penal the import of cocaine "in contravention of this Act or of any rule or order made under this Act." It does not appear that anything has been done in contravention of any rule or order made under the Act. No rule or order thereunder exists, so far as we are informed, prohibiting or restricting the import of cocaine. There may have been a contravention of an order made under section 19 of the Sea Customs Act. With that, however, we are not concerned. In the absence of any rule or order relating to the import of cocaine and made under Bombay Act V of 1878, all we have to do is to determine whether the bare provisions of the Act have been disobeyed. It is said they have, and section 9 of the Act is referred to. The Act may or may not give power to make a rule or order prohibiting or restricting the import of cocaine, but section 9 does not, it seems to me, prohibit importing that drug generally; it merely prohibits its importation unless duty has been paid, because cocaine is a thing liable to the payment of duty under the Indian Tariff Act. Having only the words of the Act itself, having no rule or order made under that Act, that is the only conclusion at which I can arrive. The intention and requirement of section 9 in the case of articles liable to duty under the Tariff Act are that the duty shall be paid. That intention and requirement can only be contravened when reasonable opportunity to pay the duty has been afforded and has been evaded. So the import with which we are dealing is not an import within the meaning of section 43 unless it is an import in contravention of the Act, that is, in the particular case put to us, in contravention of the obligation to pay duty. Ordinarily, we are told duty is required to be paid on shore usually after the ship conveying the dutiable goods has come to rest in the harbour or dock. If this be so, the mere entry into

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the harbour or tying up against the dock wall, is not importing goods in contravention of the obligation to pay duty. Further discussion of the point is useless because the facts have not been found by the Magistrate.

So far I have assumed that on the facts stated there is an import and have only considered whether such import is in contravention of the Bombay Abkari Act. There is not, in my opinion, any doubt that the facts stated do amount to an import. That word is stated in the Act to include the conveying into any part of the Presidency of Bombay from any other part of India, and therefore by implication and having regard to the common meaning of the word, must include the conveying into any part of the Presidency of Bombay by sea. The Bombay Presidency is defined in the Bombay General Clauses Act 1904 to mean "the territories within British India for the time being under the administration of the Governor of Bombay in Council."

It does not seem to be really doubted that the Bombay harbour is under the administration of the Governor of Bombay in Council, but were doubt on this point to arise, it could be set at rest by ascertaining as a question of fact whether the harbour in whole or in part is or is not under the administration of the Governor of Bombay in Council.

The facts have not been fully stated to us. They may show that there has been such an evasion of opportunity to pay duty as to make the import punishable. That, however, is for the Magistrate to decide. He has referred abstract questions to us and not questions arising out of facts fully ascertained and stated.

In my opinion it is impossible to answer the third question in a general form, and in any set of facts the answer would be so dependent on the facts as to be a matter which the Magistrate should decide for himself.

The other questions referred do not it seems to me admit of more precise answers than those here given.

CHANDAVARKAR, J.:—I concur.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar.

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February 9.

TRIMBAK GOPAL PARICHARAK AND OTHERS (ORIGINAL DEFENDANTS 6, 7, 10, 8, 11), APPELLANTS, *v.* KRISHNARAO PANDURANG AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 1, 4, 12), RESPONDENTS.*

KRISHNARAO PANDURANG AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VISHVANATH GOPAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 9—Civil Court—Jurisdiction—Suit of a civil nature—Suit by temple committee against temple servants for declaration as to their right to have the services performed.

The plaintiffs, as members of the committee of management of a temple, received annually from Government a sum of money for defraying the expenses of certain kinds of religious worship in the temple, and it was obligatory upon them to get the worship performed by the hereditary officers or servants attached to the temple. Those officers, owing to quarrels among themselves, failed to perform the worship, with the result that the duties owing to the deity were neglected and the funds in the hands of the plaintiffs remained undisbursed for the purposes for which they were held in trust. The plaintiffs, therefore, filed this suit against the temple servants for a declaration of the former's right to disburse the funds by getting the worship performed by a suitable person or persons of their own choice in the event of the hereditary officers or servants of the temple concerned failing to perform it, and for an injunction to restrain those officers or servants from obstructing the plaintiffs in the exercise of the right so declared. It was objected to the suit that it was not triable by a Civil Court because its prayer was for a bare declaration of the plaintiffs' right either to perform by themselves or to get performed certain religious ceremonies in a temple, and there was no contest as to any right to property or to any office.

Held, that the suit was of a civil nature.

An action would lie against the plaintiffs by the Advocate General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds after getting the religious worship for which those funds were intended, properly performed. Such a right was not the less of a civil nature though the funds were to be appropriated to religious ceremonies. The Court was not called upon to enter into the adjudication of any rites or ceremonies as such. What it had to decide was the right of the trustees to fulfil the trust unhindered.

* Cross Appeals Nos. 454 and 589 of 1907.

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TRIMBAK GOPAL v. KRISHNARAO PANDURANG.

SECOND APPEALS from the decision of V. M. Bodas, First Class Subordinate Judge, A. P., at Sholápur, confirming the decree passed by T. R. Kotwal, Subordinate Judge at Pandharpur.

Suit for declaration and injunction.

The plaintiffs were the committee of management of a temple at Pandharpur and as such were in receipt from Government of a certain allowance to meet the cost of certain religious ceremonies which came to be known as the *Sarkári puja*.

The defendants were the representatives of the families known as Badves and Shevadharies. The right to perform all the worship of the deity in the temple appertained to the former and it was their hereditary right. The other, the Shevadharies, performed a subordinate part in the worship and their right also was hereditary.

On the 4th July 1902, these two classes of temple officers quarrelled among themselves the result of which was that the *Sarkári puja* and all other ceremonies in honour of the deity were left unperformed that day and for ten consecutive days.

The plaintiffs therefore sued for a declaration that the defendants were not entitled to leave unperformed the usual worship of the deity, and that they were entitled to get the *puja* performed by the defendants, or if the latter refused, by other fit persons; and for an injunction against the defendants restraining them from obstructing the plaintiffs in getting the worship performed.

The plaintiffs' claim was decreed by the Court of first instance. And, on appeal, it was upheld by the lower appellate Court, on the following grounds:—

"The conduct on the part of the Badves and the Sevadharies certainly gives the plaintiffs a cause of action to sue for the relief which they have now claimed, because what happened in July 1902 may happen again at any time; and the only question, so far as I can see, is, whether having regard to the provisions of section 11 of the Code of Civil Procedure, 1882, the suit can be maintained. I agree with the lower Court in holding that it can be. It is to be remembered that the present allowance from Government is the continuation of the old grant which the former Governments had made especially for defraying the expenses of particular *pujas* and other services to the deity. From the first, the money has been applied rigidly to those purposes and to no other.

Not only that but till the annexation of the Sátára Raj the application of the money had actually been made by the officers of Government themselves. In sanctioning the continuance of the allowance, the present Government has also specifically mentioned the several *pujas* and services to which the money should be applied by the committee of management appointed by them. It is admitted and proved that the Badves and Sevadharies have no right to stop the morning and other *pujas* and the plaintiffs' right to have them done through the Sarkári Badves that is, a descendant of Bhimaji or his representative. All this goes to show that the present is a suit not to vindicate plaintiffs' right to a mere dignity or merely for a declaration of their right to have certain religious ceremonies performed, but for something more which is one of a civil nature."

The parties appealed to the High Court.

G. S. Rao for the Shevadhari defendants:—This suit is not of a civil nature. It is brought to enforce religious duties; and is therefore not cognizable by a Civil Court. See *Vasudev* v. *Vamnaji*[1]; *Ramrao* v. *Rustumkhan*[2]; *Waman Jagannath Joshi* v. *Balaji Kusaji Patil*[3]; *Vanamamalai Bhashyakar* v. *Krishnaswami Thathachariar*[4]; *Subbaraya Mudaliar* v. *Vedantachariar*[5]; *Kooni Meera Sahib* v. *Mahomed Meera Sahib*[6]; *Krishnasami Ayyangar* v. *Samaram Singrachariar*[7].

Chamier (with *S. S. Patkar*) for the Badve defendants was heard in support of Mr. Rao's contentions.

D. A. Khare, with *P. D. Bhide*, for the plaintiffs:—The suit is not of a religious but of a civil nature It is brought to vindicate the natural rights of each private individual to enter a temple and perform the worship. In this the plaintiffs in common with other private individuals were obstructed and they have brought this suit to vindicate their civil rights.

CHANDAVARKAR, J.—It is contended for the appellants, on the authority of this Court's decision in *Vasudev* v. *Vamnaji*[1], that a Civil Court has no jurisdiction to try a suit of the present character because its prayer is for a bare declaration of the plaintiffs' right either to perform by themselves or to get performed certain religious ceremonies in a temple, and there

(1) (1880) 5 Bom. 80.
(2) (1901) 26 Bom. 198.
(3) (1888) 14 Bom. 167.
(4) (1905) 16 M. L. J. 150.
(5) (1904) 28 Mad. 23.
(6) (1906) 30 Mad. 15.
(7) (1906) 30 Mad. 158.

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is no contest as to any right to property or to any office. Carefully analysed, the suit is not of that nature. The plaintiffs are members of the Committee of Management of the Temple of *Shri Vithoba* and *Shri Rakhmabai* at Pandharpur. They hold the office under a *sanad* from Government and receive annually a certain sum of money for defraying the expenses of certain kinds of religious worship in the Temple known as *Sirkari Puja*. The obligation is attached to that office to get that worship performed by the hereditary officers or servants attached to the Temple. The plaintiffs complain that those officers, owing to quarrels among themselves, have failed to perform the worship with the result that the duties owing to the idol are neglected and the funds in the hands of the plaintiffs undisbursed for the purposes for which the plaintiffs hold those funds in trust. Accordingly, they ask for a declaration of their right to disburse the funds by getting the worship performed by a suitable person or persons of their own choice in the event of the hereditary officers or servants of the Temple concerned failing to perform it; and they ask for an injunction to restrain those officers or servants from obstructing the plaintiffs in the exercise of the right so declared.

The facts above stated, which are found proved by both the Courts below, distinguish the present case from that in *Vasudev* v. *Vamnaji*[1]. The latter was a case of bare religious worship. Here the plaintiffs are trustees of a public charitable trust holding moneys in their hands for disposal in a certain manner for certain defined purposes. They hold the funds on behalf of the public for the benefit of the deity of the Temple, who, in Hindu Law, is considered as a sacred entity, or ideal personality possessing proprietary rights: see *Thackersey Dewraj* v. *Hurbhum Nursey*[2]. The deity of the Temple being, according to that law, a juridical person as "the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land. Those who take physical possession of the one as of the other kind of property incur thereby a

(1) (1880) 5 Bom. 80. (2) (1884) 8 Bom. 432.

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responsibility for its due application to the purpose of the foundation. . . . They are answerable as trustees . . . and a remedy may be sought against them for mal-administration by a suit open to any one interested:" *Manohar Ganesh* v. *Lakhmiram Govindram*[1]. It would be so in the case of non-administration also. An action would lie against them by the Advocate-General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gives them a corresponding right to disburse the funds after getting the religious worship, for which those funds are intended, properly performed. Such a right is not the less of a civil nature though the funds are to be appropriated to religious ceremonies. The Court is not called upon to enter into the adjudication of any rites or ceremonies as such. What it has to decide is the right of the trustees to fulfil the trust unhindered.

The suit was brought against two sets of defendants—one consisting of the *Badves* and the other consisting of the *Shevadharis*, of the Temple. The lower Courts have given to the plaintiffs a decree as against both the classes of defendants. But it is urged in this second appeal that the decree is erroneous in law so far as it affects those *Shevadharis* who are not Pujaris, because these had nothing to do with the dispute between the *Badves* and the other *Shevadharis* which led to the stoppage of the worship and compelled the plaintiffs to file the suit. This objection does not appear to have been raised in the lower appellate Court. That Court has found that the plaintiffs had to sue because of the conduct of the *Badves* and the *Shevadharis*. That finding of fact included all classes of *Shevadharis*. Even assuming that the *Shevadhari* defendants, who are not Pujaris, had done nothing before suit to give the plaintiffs a cause of action against them, the denial of the plaintiffs' right by them in their written statements is sufficient in law to cure that defect and entitle the plaintiffs to the declaration claimed as against them under section 42 of the Specific Relief Act.

The decree of the lower Court declares the right of the plaintiffs to get the worship performed by "their *Badves* appointed

(1) (1887) 12 Bom. 247 at p. 265.

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perpetually, *viz.*, the descendants of Bhimaji." For the appellants it is complained that this term of the decree ignores the rights which they have according to the decrees passed by this Court in litigation between them and the *Badves*. I do not think that the declaration was intended by the lower Courts to have any such result. But to prevent all ambiguity or misconstruction, I would add the words, "with due regard to the judicially declared rights of the other *Badves* and the *Shevadharis*", after the words above quoted. As to the Second Appeal preferred by Mr. Chamier's clients (S. A. 488 of 1907) I do not think that there is any conflict or inconsistency between the decree passed by the Subordinate Judge Mr. Kotval, and that passed by the Subordinate Judge Mr. Karkare, both of which have been confirmed by the lower appeal Court.

The lower Court's decree is imperfect in that it does not give to the plaintiffs the particular relief for which the suit was brought. They asked for a declaration that in the event of the *Badves* and the *Shevadharis* refusing or failing to perform the *Sirkari Pujas*, they (the plaintiffs) were entitled to get the *pujas* performed by a suitable person or persons of their choice. This declaration must be added to the decree.

The result is that the lower Court's decree must be modified by adding the words and the declarations above mentioned. As to costs, the appellants in Second Appeal No. 454 of 1907 must pay the costs of the respondents (separate sets for plaintiffs and the respondent defendants). In Second Appeals 588 and 589, the appellants must have their costs from the respondents. In Second Appeal 488 of 1907 each party should bear his own costs.

Decree varied.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

RAJENDRALAL MANEKLAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SURAT CITY MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT.*

1908.
February 11.

Negligence—Municipality—The Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Misfeasance.

The plaintiff sued to recover damages from the defendant Municipality for injury done to his property by storm water. The water had collected in an adjoining ditch, which the Municipality had not kept in a state of repair, but had allowed it to be choked with the rubbish of the town. They constructed a dam in the adjoining creek, but allowed the sluices at the dam to be choked up with weeds, sedges and silt. The consequence was that the storm water which had collected in the creek passed on to the plaintiff's land and did damage.

Held, that there was misfeasance on the part of the Municipality, for they had turned their works by their negligence into a nuisance so as to throw the water collected on their property—the creek—on to the plaintiff's land, and that, therefore, they were liable for the damage caused thereby.

Borough of Bathurst v. *Macpherson*(1), followed.

APPEAL from the decision of Jehangirji E. Modi, First Class Subordinate Judge at Surat.

The facts of this case are set forth in the judgment at length.

Baptista with *N. M. Samarth*, for the appellant.

The Government Pleader, for the respondent.

KNIGHT, J.:—The facts of this case are set forth in the able and elaborate judgment of the learned First Class Subordinate Judge. Briefly, the plaintiff sues to recover damages from the Surat Municipality on account of injury done by storm water to certain garden land of his known as the Gopitalão, alleging that it was owing to the negligence of the Municipality that the water first broke into his garden, and that having broken in, it did not drain off.

* First Appeal No. 124 of 1907.

(1) (1879) 4 App. Cas. 256.

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The negligence alleged is of three kinds: firstly, improper and inadequate construction of the sluice gate known as the Macca dam; secondly, defendant's refusal or omission to drain the water off the garden by means of a disused culvert that once connected it with the main ditch; and thirdly, defendant's failure to keep the ditch cleared from obstruction and the sluice gate in proper working order.

Now, the first of these allegations is demonstrated to be unsustainable by the plaintiff's own expert witness, as the learned Subordinate Judge has shewn. Mr. Maneklal, Engineer (Exhibit 23) deposes that "if the sluice gates had been kept open, the Gopitaláo would not have suffered any damage from the overflow of the waters." Evidently, therefore, plaintiff cannot assert that the damage was caused to his property by faulty construction of the original works.

The second, we think, discloses no good cause of action against the Municipality. It seems that at one time the Gopitaláo was used as an overflow reservoir from the Macca ditch itself, and, in order to subserve this end, was connected with it by a culvert designed, not to drain the water from the Gopitaláo, but to draw it off from the ditch. This arrangement was abandoned, many years ago, in 1875, when the culvert was finally closed. It is probable perhaps that if it had been opened after the irruption of the heavy flood which has given rise to this suit, much of the damage caused to the garden that now occupies the bed of the Gopitaláo might have been averted. But we are not satisfied upon the evidence that it was reasonably possible to re-open it at the time. The plan put in indicates that it had become deeply embedded in silt or rubbish on the ditch side, while on the Gopitaláo side it was many feet under water. Under any circumstances, it was just as easy for the plaintiff to open it as for the Municipality; and, although the latter declined to undertake the job when the plaintiff suggested that they should do so, it is not pretended that they offered any objection or hindrance to his doing it himself.

We are now left with the third allegation of negligence, *viz.*, that the Municipality allowed the ditch to become choked by silt and rubbish, and that the sluice gates were not in proper

working order. This demands more serious treatment than the other two, and we think that it has not received adequate consideration in Mr. Modi's otherwise excellent judgment.

To commence with, this item of negligence was explicitly asserted in the plaint. "The defendant Corporation has, instead of preserving the ditch in its original condition, filled up the greater portion of it with the rubbish of the town;" and again, "this rush (of water) was owing to the defendant having filled up the ditch as above and the consequent incapacity of the ditch to contain the rain water;" and, "the sluices in the dam had not been kept in the condition in which they ought to have been kept, ... the openings having been kept closed."

All this is definite enough. The allegation re-appears in the first material issue framed by the Subordinate Judge who commenced the trial, Mr. Chimanlal:—"Whether the rain water on July 16th, 1902, rushed into the Gopitaláo, knocking down its western gate, on account of the defendant's negligence in not keeping its ditch on the north in proper order, and in not adopting measures, etc., etc." It is noticeable that this is practically the only allegation of fact embodied in the issues, which make no explicit reference to the other two items of negligence. Judging from the pleadings and the issues, the ordinary reader would conclude that plaintiff complained of little or nothing beyond the failure of the Municipality to maintain the drainage arrangements in proper order, and that what Mr. Modi terms the main charge of negligence, to which he has devoted the bulk of his judgment, was more in the nature of formal or subsidiary pleading. No doubt, the course adopted by the learned counsel engaged for the plaintiff, who even in the argument which he addressed to us seemed to have failed to grasp the strong point of his client's case, was primarily answerable for this; though it is difficult to understand how after his own expert witness' admission in examination-in-chief (quoted above) he can have thought it worth while to prosecute the so-called main charge of negligence further. The result, however, was important, for it not only diverted the attention of the Court from the real matter in dispute to others which hardly

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needed discussion, but, as we shall shortly shew, led everyone concerned to ignore the most important piece of evidence on the record.

In his detailed report (Exhibit 25) Mr. Maneklal, Engineer, after reciting a number of positive facts that he had observed, wrote: "From these facts it can easily be admitted that the old channel has been filled up with enormous quantities of silt which the defendants appear never either to have noticed or taken care to remove." The channel here means the ditch, as the context shews, and not, as plaintiff's counsel supposed, the abandoned culvert. There is certainly room for misunderstanding, inasmuch as the preceding portion of the paragraph is mainly occupied with the culvert; but the passage immediately succeeding—"This channel runs with almost a uniform slope till it reaches Macca dam"—places the meaning beyond doubt. The stream, Mr. Maneklal continues, cuts a number of narrow passages all along through the silt. "There are no regular side slopes, and the bed seems to have been in some places on or about the same level as the surrounding ground." The picture delineated is clear and intelligible, and we must express our regret that the misapprehension to which we have referred caused these important assertions to pass almost unnoticed in the oral examination of the witness.

They received however very substantial corroboration. Mr. White, the Executive Engineer of Surat, writing in 1876, observed: "The lower sluices of the Macca dam . . . . . are very much silted up, about 5 feet of silt having accumulated on the up stream side of the dam." If that was the state of affairs in 1876 (we are not sure as to the precise year, but the argument would be as strong even if it were 1896), it can easily be conjectured what the condition of the ditch must have been in 1902. For here we may observe that the defendant Municipality have not asserted, much less attempted to prove, that they ever spent one farthing, or employed one single coolie, in keeping the ditch clear.

With this the plaintiff can claim to have laid a very solid foundation for his charge of negligence against the Municipality in the detail indicated. Placing wholly on one side the rest of

his oral evidence, we now come to the very important evidence to which we referred above; a document buried completely out of sight under the silt of irrelevant discussion, and exhumed, not by the efforts of the Counsel for the plaintiff, but by our own unaided researches.

This document is to be found below Exhibit 39, which is an application made by the plaintiff to the Municipality on July 28, 1902, only twelve days after the flood, and while the water was still standing in his garden. He begged the Managing Committee to inquire into the damage that was being done to his property; and the application was forwarded with an endorsement over the Municipal Secretary's signature to the following effect:—

"With reference to the above, the undersigned begs to state that on the day mentioned by Mr. Maneklal (*i. e.*, July 17th, the day after the flood, but perhaps the day of the flood itself is intended) it was found by the Municipal Overseer that the openings of the sluice under the Macca bridge were choked up with weeds, sedges and silt and were rendered unworkable; and as fears were entertained of a rising in the Tapti, it was imperatively necessary to keep (*i. e.*, put) the sluices in working order. The Municipal Overseer had therefore sent a party to clear off the sluices, as is usually done on such occasions."

This is dated 29th July 1902.

Now how the writer of this endorsement could have the impudence to stand in the witness box and swear that "he knew that the sluices used to be kept open," and that he merely sent and made inquiries in order to make certain, we find it difficult to understand. Still more marvellous is it that he should have been allowed to leave the witness box without being confronted with this endorsement and asked to reconcile it with his evidence. Exhibits 34, 37, 38 and 40 were shown to him, it appears, but the vitally important Exhibit 39 was wholly overlooked.

In the light of that endorsement however it is an easy task to appraise at its true value both the evidence of the Secretary and that of the Fire Brigade Superintendent (Exhibit 67) who supports him. The latter gentleman would have us believe that "the strict rule is that the sluices are always to be kept open.

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All the sluices in the city are cleaned and oiled in the beginning of June." He being the head of the Department charged with the duty of seeing this done, it is natural enough that he should pretend that he punctually discharged the duty during the year in question. It is significant however that the private diary which he produced in Court shewed that the sluices were greased on July 31st, but contained no such entry prior to that date ("but there is no entry in May and June; for that was done at the usual time punctually"); and that other entries show that on August 29th some silt was cleared away, and on the 7th September the sluices were again greased. That is to say, the book indicates that a great deal of attention was paid to the dam *after* the flood, and none at all before. It is also to be noted that this witness proves that the Secretary visited the dam during the flood; so that the contents of the endorsement cannot be cast aside as mere hearsay.

We may now return to the "interested" evidence of plaintiff's uncle Maneklal (Exhibit 30), armed with the means of gauging its probability. He tells us that he visited the dam on the afternoon of the flood, and found the Overseer there, with the Fire Brigade Superintendent and half a dozen coolies, busily engaged in trying to open the sluices. The Overseer told him that the gates had long been closed, and that it was therefore difficult to open them; and he came away. This of course the Overseer and other Municipal employés deny; but it accords too closely with the statements made in the endorsement not to command our credence. The Overseer, it may be noted, admits that the rubbish and silt brought down by the water were removed by the Municipality after the 16th of July (Exhibit 60); and the Fire Brigade Superintendent assures us that violent rain such as that which produced this flood would not deposit any silt near the dam. It must therefore follow that the silt removed was the result of prior accumulations.

Emphasizing once more the omission of the defendant Municipality to prove, or even to assert, that they had ever made the smallest provision for keeping the ditch clear prior to the flood, we may here quit the evidence. The conclusions to which it points are manifest. The carrying capacity of the ditch had

been greatly reduced by the gradual accumulation of silt and rubbish in its bed, and the Municipality had done nothing to maintain it in proper order. The sluices at the dam "were choked up with weeds, sedges and silt and were rendered unworkable" in the Secretary's own words; and the water therefore collected in a channel of reduced capacity, and, unable to discharge itself through the sluices, burst into plaintiff's garden. In other words, the material allegations in the plaint are fully borne out by the evidence. It now remains to determine the legal consequence of this finding.

It is argued for the repondent Municipality, on the authority of the ruling of this Court in *Achratlal* v. *The Ahmedabad Municipality*[1], that the facts held proved above amount to no more than non-feasance, for which the respondent is not liable in damages at the instance of any private individual. In that case it was held that there being no duty cast upon the Municipality by the District Municipal Act to repair roads vested in it, no person injured by the non-repair of such a road could sue it for damages, because the omission of the Municipality to repair was non-feasance. But, as has been pointed out by the House of Lords in *Mayor &c. of Shoreditch* v. *Bull*[2], "the distinction between non-feasance and mis-feasance might be carried too far," and "in some cases non-feasance might be equivalent to mis-feasance." And of the latter *Borough of Bathurst* v. *Macpherson*[3] affords an illustration. The facts of that case were as follows:—The Borough of Bathurst had constructed a barrel drain under or in proximity to the highway. The drain having fallen into disrepair, a portion of the highway subsided into it, leaving a hole into which the plaintiff's horse fell as he was riding along the highway, with the result that he sustained personal injuries. The Privy Council held upon these facts that the Municipality having constructed the barrel drain was bound to keep it in a state of repair which would prevent its causing a dangerous hole to be formed in the highway. That decison is explained in these terms by the Privy Council in *Municipal Council of Sydney* v. *Bourke*[4]:—

(1) (1904) 28 Bom. 340: 6 Bom. L. R. 75.
(2) (1904) 20 T. L. R. 254.
(3) (1879) 4 App. Cas. 256.
(4) [1895] A. C. 433 at p. 441.

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"The *ratio decidendi* was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous."

Similarly here, the respondent Municipality constructed the dam in the Macca creek, and by not keeping the ditch properly clean but by allowing it to fill with silt and permitting the dam to be choked with weeds and sedges, turned their works by their negligence into a nuisance so as to throw the water collected on their property—the said creek—into appellant's land. That is a clear act of mis-feasance and falls within the principle of law illustrated in *Borough of Bathurst* v. *Macpherson*.(1) The respondent's act is similar to that of a man who brings water on to his own land and dams it up so that if it breaks away it must be a danger to his neighbour and must do him injury; there the man is liable, though he does nothing to let the water out, but it bursts away without any subsequent act of his. (See the judgment of Brett M. R. in *Whalley* v. *Lancashire and Yorkshire Railway Company*.(2))

On the question of damages both parties through their respective pleaders agree before us to abide by the decision of the Collector of Surat acting as arbitrator in the matter. The Collector to give his award and send it to this Court within two months—the time to be extended if necessary. Liberty to apply.

[*Note*.—Subsequently an application for a review of this judgment was refused.—Ed.]

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(1) (1879) 4 App. Cas. 256. (2) (1884) 13 Q. B. D. 131 at p. 137.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

BHAURAO *alias* RAMCHANDRA JIWAJI PITRE (ORIGINAL PLAINTIFF), APPELLANT, *v.* RADHABAI *kom* LAXUMAN JIVAJI PITRE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1909. *March* 9.

Arbitration—Award—Suit to file an award—Want of jurisdiction in the arbitrators can be pleaded—Award is equivalent to a judgment even before a decree is passed upon the award—Partition is effected by the award itself.

When a suit is brought to enforce an award a party to it can urge and show that it is not binding upon him on the ground of want of jurisdiction in the arbitrators.

An award is equivalent to a judgment whether it has passed into a decree or not. It is binding upon the parties. In cases where it directs partition to be effected, it dissolves the joint family and from the moment of its date it severs their joint interests.

Muhammad Newaz Khan v. *Alam Khan*(1), and *Laldas* v. *Bai Lala*(2), followed.

APPEAL from the decision of V. V. Phadke, First Class Subordinate Judge at Belgaum.

Laxman and Bhaurao (plaintiff) were two brothers who lived together. Disputes arose between them and they referred their disputes to arbitration. The arbitrators delivered the award which effected a partition between the two brothers.

Bhaurao next applied to the Court for a decree in the terms of the award. Laxmanrao opposed his application. But before it could be adjudicated upon by the Court, Laxmanrao died. Bhaurao then withdrew his application.

Bhaurao filed the present suit wherein he claimed possession of the whole property, alleging that no decree having been taken upon the award, the brothers were not divided in interest, and that the whole property survived to him.

* First Appeal No. 51 of 1908.

(1) (1891) 18 Cal. 414. (2) (1908) 11 Bom. L. R. 20.

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His claim was resisted by the widow of Laxmanrao.

The Subordinate Judge rejected the plaintiff's suit for reasons which he expressed as follows :—

"Whether an award can be said to effect separation as soon as it is passed is a question untouched by any decision, and so far as I am aware there is no Bombay ruling covering the point. In two cases the Madras High Court has decided (I. L. R. 19 Mad. 290; I. L. R. 20 Mad. 490) that an award is a final judgment, that partition is to be deemed as effected on the date of the award and that an award bars any fresh suit for partition. It appears that in the case in Vol. 19 all the parties had objected to the award and still the Court held that the parties must be held to be bound by it. The above authorities govern the present case and I have no hesitation in following them. The award being thus binding on the parties the plaintiff must bring a suit to enforce it. He cannot pretend to ignore it and claim the entire property in contravention of the terms of the award as if he has become the sole owner of the entire property by the death of his brother.

The plaintiff appealed to the High Court.

M. B. Chaubal and *S. S. Patkar*, for the appellant :—The cases of *Krishna Panda* v. *Balaram Panda*[1] and *Subbaraya Chetti* v. *Sadasiva Chetti*[2] cited by the lower Court do not apply to the present case because when the parties referred the matter to the arbitrators each maintained that he was the owner of the whole property—they did not concede that the property was joint. The question which the arbitrators had to decide was whether the property was the self-acquired property of any of the parties to the suit or was joint property and could not go further and decide that the property should be partitioned. The arbitrators had no jurisdiction to go beyond the reference and to bring about a disruption of the joint property without the consent of the parties. Secondly, the award was only an inchoate partition. When the application for filing the award was numbered as a suit, Laxman, the younger brother, thought he would survive the appellant and raised various objections to the award including the objection that the award was not a legal award. But Laxman died and the application was withdrawn by the appellant. Till the award was filed, there could not be said to be a final decree. It has been held that so long as a decree for

(1) (1896) 19 Mad. 290. (2) (1897) 20 Mad. 490.

partition remains under appeal, it does not effect severance: *Sakharam Mahadev Dange* v. *Hari Krishna Dange*[1]. We say that the award was at most an inchoate partition and did not effect severance: *Babaji Parshram* v. *Kashibai*[2].

G. S. Rao, for respondent:—The point as to want of jurisdiction in the arbitrators to effect partition as being beyond the reference was not raised in the Court below. On the second point award is equivalent to a judgment: *Laldas* v. *Bai Lala*[3].

CHANDAVARKAR, J.:—The first point raised on appeal is that the decision of the arbitrators with regard to the partition which they directed to be made by the award was *ultra vires,* because there was no submission upon that point to their judgment and that, therefore, the award so far as the direction as to partition was concerned was invalid and not binding upon the parties. It is no doubt open to the appellant to urge and show that the award is not binding upon him for want of jurisdiction in the arbitrators. But the question of jurisdiction turns in the case on a question of fact, *viz.*, did the submission or reference to arbitration include the question of partition or was it confined only to the dispute whether the property was joint or self-acquired? The former like the latter question depended upon evidence. But the pleadings in the Court below show that that question was not only not raised there but was virtually waived. On the basis that the award was valid what was urged in the Court below was that the award did not effect a partition by metes and bounds or create a severance of interests between the two brothers, and dissolve the co-parcenery between them, but that it merely resulted in an inchoate partition, which could not legally take effect until the award passed into a decree.

It was urged that the award, so long as it did not pass into a decree, could not effect severance of interests between the brothers. But that is not the law. *Muhammad Newaz Khan* v. *Alam Khan*[4] and *Laldas* v. *Bai Lala*[5] are authorities

(1) (1881) 6 Bom. 113.
(2) (1879) 4 Bom. 157.
(3) (1908) 11 Bom. L. R. 20.
(4) (1891) 18 Cal. 414.
(5) (1908) 11 Bom. L. R. 20.

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for the proposition that an award is equivalent to a judgment, whether it has passed into a decree or not. It is binding upon the parties. And where it directs partition to be effected, it dissolves the joint family, and from the moment of its date severs their joint interests. On these grounds we confirm the decree with costs.

Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.

March 18.

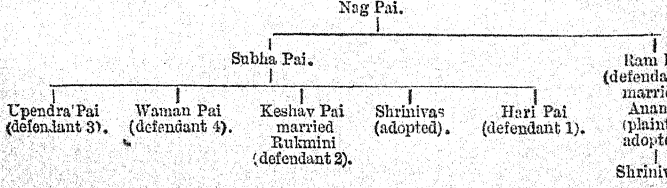
ANANDI *alias* SHITABAI *kom* RAM PAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI SUBA PAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Mitakshara—Adopted son—Succession to the adopted son—Adoptive mother entitled to succeed in preference to adoptive father.

Under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed, in preference to the adoptive father, to a son taken in adoption.

SECOND appeal from the decision of C. C. Boyd, District Judge of Kánara, confirming the decree passed by K. R. Natu, Subordinate Judge at Kumta.

The relationship between the parties to this suit appears from the following genealogical tree :—



The parties shown in the above genealogical tree were living together as a joint family. A partition took place between

* Second Appeal No. 800 of 1907.

them on the 10th August 1888. At this partition Ram Pai (defendant 5) obtained one-half share and the five sons of Subha Pai obtained the other half.

Both Ram Pai and his wife Anandi adopted Subha Pai's son Shriniwas as their son. But subsequently to the adoption, a son, Purshottam, was born to them. They therefore allotted to Shrinivas one-fourth of the moiety of the estate which had on partition come to the hands of Ram Pai. Thus Shrinivas obtained $\frac{1}{8}$ share of the entire estate.

Shrinivas died a bachelor on the 29th July 1892.

On the 25th July 1904, Anandi filed this suit to recover Shrinivas' $\frac{1}{8}$th share in the family property.

The defendants (sons of Subha Pai) and Ram Pai resisted her claim.

The Subordinate Judge dismissed the suit on the ground that Anandi as the adoptive mother of Shrinivas was not entitled to succeed in preference to the adoptive father. His reasons were as follows:—

"Although under Mitakshara which prevails here a mother by birth would be a preferable heir to father by birth, still whether an adoptive mother would have a preference to an adoptive father has not, so far as I know, been yet decided by any of the High Courts. No such decision has been pointed out to me. The reasons which give a preference to a mother by birth over a father by birth do not, I think, apply in the case of an adoptive mother. By many commentators, a mother by birth is preferred to the father by birth upon considerations derived from a comparison of the respective degrees in which mother and father share, in the composition of the sons, while the Mitakshara prefers her on the ground of greater propinquity (Mayne, section 521). Paragraph 167 of Mayne discusses the question of the preference amongst the several widows of deceased's adoptive father. But no authority is cited as to whether an adoptive mother would have a preference to an adoptive father. In the present case the adoption of Shrinivas was made by deceased, defendant 5. According to the Mitakshara, it has been decided in Bombay that a step-mother cannot be introduced as an heir under the word *mata* (mother) but that she is a more distant heir as the wife of *gotraja sapinda* and therefore herself a *gotraja sapinda* according to the doctrines of this Presidency (*vide* I. L. R. 19 Bom. 707). Just as therefore a step-mother cannot have a preference to a father by birth, so I think an adoptive mother cannot have a preference to an adoptive father."

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On appeal this decree was confirmed by the District Judge.

The plaintiff appealed to the High Court.

S. S. Patkar, for the appellant:—We submit that the adoptive mother is entitled to succeed to the estate of the son taken in adoption in preference to the adoptive father. She has the preferential right to succeed if the son is natural born. The grounds of her preference are (1) that माता comes first in the compound मातापितरौ; (2) that the mother is not necessarily common to all sons but the father is; and (3) that she is nearer by propinquity. On the texts, the adoptive mother is entitled to preference; and even according to decided cases an adopted son occupies the same position as a natural son except in a few instances which are defined both in the Dattaka Chandrika and Dattaka Mimansa. See *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*[1]. An adopted son is heir to the *stridhan* of his adoptive mother: *Teencowree Chatterjee* v. *Dinonath Banerjee*[2]. He has the rights of succession as a natural son: *Surjokant Nundi* v. *Mohesh Chunder Dutt*[3]; *Sham Kuar* v. *Gaya Din*[4]; Mayne's Hindu Law, page 214, section 164; page 217, sections 166, 167 (7th Edn.).

S. V. Palekar, for the respondent:—In the case of a natural son, the mother enjoys preference because she has conceived and nurtured him. This reason does not apply to an adopted son. It is competent to a bachelor to adopt: *Gopal Anant* v. *Narayan Ganesh*[5] and in that event the father would be the heir. Thus, the father has the preferential right: and he has been accorded it by other commentators.

CHANDAVARKAR, J.—The sole question argued in this second appeal is whether, under the Hindu Law, governed by the Mitakshara School, the adoptive father or the adoptive mother is the preferential heir to an adopted son. According to the Mitakshara, when a son dies, leaving his parents as his heirs, the mother succeeds to the son's estate before the father. Both the Courts below have, however, held in the present case that

(1) (1883) L. R. 10 I. A. 138.
(2) (1865) 3 W. R. (Civ. Rul.) 49.
(3) (1882) 9 Cal. 70.
(4) (1876) 1 All. 255.
(5) (1888) 12 Bom. 329.

the rule in question applies only to the estate of a natural-born but not to that of an adopted son dying.

The learned Subordinate Judge says:—

"The reasons which give a preference to a mother by birth over a father by birth do not, I think, apply in the case of an adoptive mother. By many commentators a mother by birth is preferred to the father by birth upon considerations derived from a comparison of the respective degrees in which mother and father share in the composition of the son, while the Mitakshara prefers her on the ground of propinquity."

Vijnaneshwara puts the preference of the mother to the father on two grounds, which, as West J. has rightly observed in his judgment in *Lallubhai* v. *Mankuvarbai*[1] are of an artificial character. They are (1) that the word *pitarau* (parents), which occurs in Yajnyavalkya's text specifying the heirs in the case of obstructed succession, is the abbreviation of two words forming a conjunctive compound, *mātāpitarau* (parents), in which the word *mata* (mother) comes before the word *pitru* (father); and (2) that the mother's propinquity is greater than the father's. (The Mitakshara, Section III, sections 2 and 3, Stokes's Hindu Law Books, pp. 441 and 442).

No doubt propinquity does enter into the reasoning of Vijnaneshwara but it does not on that account follow that he intended to deny the same propinquity to an adopted son which he allows to the natural-born son. The fallacy of the Subordinate Judge's reasoning lies in the fact that he gives the go-bye altogether to the legal fiction on which the whole doctrine of adoption in Hindu Law is founded. As observed in West and Bühler, "the effect of adoption is to sever the boy adopted entirely from his family of birth. His proper residence is with his adoptive parents. He exchanges 'the gotra' of his real father for that of the adoptive father as a woman enters her husband's gotra by marriage. He learns the sacred invocations in his family of adoption, and in the absence of a son by birth completely takes his place." (West and Bühler's Digest of Hindu Law, 3rd Edition, pp. 934 and 935). The

(1) (1876) 2 Bom. 388 at p. 439.

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fiction has the effect of bringing about the ties of blood-relationship between the boy and his adoptive parents. If that is so, the remark of the Mitakshara (Stokes's Hindu Law Books, pp. 442 and 443) that "the father is a common parent to other sons, but the mother is not so: and, since her propinquity is consequently greatest, it is fit, that she should take the estate in the first instance, conformably with the text, 'To the nearest Sapinda the inheritance next belongs'", must apply in virtue of the legal and Shastric fiction as much to an adopted as to a natural-born son.

The text of Yajnyavalkya in which the heirs in the case of an obstructed succession are specified applies to succession to an adopted son as much as to succession to a natural-born son. Besides, Vijnaneshwara points out in another connection that there is a blood-tie between an adopted son and the family and collateral kinsmen of his adoptive father. Dealing with the twelve kinds of sons recognised by the old but now obsolete Hindu Law, he refers to a text of Manu, according to which the first six, among whom are the natural-born and the adopted son, are heirs and kinsmen, and the other six are not heirs but only kinsmen. Vijnaneshwara then explains the text as follows:—"That must be expounded as signifying, that the first six may take the heritage of their father's collateral kinsmen (Sapindas and Samanodakas) if there be no nearer heir; but not so the last six. However, consanguinity and the performance of the duty of offering libations of water and so forth, on account of relationship near and remote, belong to both alike." (The Mitakshara, Chapter I, Section XI, placitum 31, Stokes's Hindu Law Books, page 422.) This explanation he supports by another text of Manu relating to an adopted son: "A given son must never claim the family and estate of his natural father. The funeral oblation follows the family and estate; but of him, who has given away his son, the obsequies fail." Stokes's Hindu Law Books. (Page 422, placitum 32). It is true that in these citations from the Mitakshara the reference is only to the father, not to the mother. But that does not mean that the mother is excluded. Vijnaneshwara is one of those who held strongly to the principle of the Shastras that the

husband and wife form one body. He refers to the principle and its limitations in the Chapter on Debts[1]. In the Chapter on Penance he says that the husband and wife form one body by reason of their joint rights in matters of religious merit[2], secular affairs, and pleasures.

As West, J., points out in *Lallubhai Bapubhai* v. *Mankuvarbai*[3] Vijnaneshwara "really accepted the proposition 'that of him whose wife subsists one-half the body survives' as a basis for actual practice."

The learned District Judge, accepting the view of the Subordinate Judge, has refused to follow what he calls "the letter of the law" of the Mitakshara on the ground that "the fiction of the physical reality of an adoption is not always maintained." But the cases in which it is not maintained are specified and not left to conjecture or inference. Those, again, are cases which form exceptions to the general rule which is the result of the legal fiction. And it is a rule of construction (Mimansa) according to Hindu Law, that where an exception exists to a general rule, the exception should be confined within the strictest limits so as not to unduly encroach upon the general rule. See this rule of construction explained in *Gangu* v. *Chandrabhagabai*[4]. The legal fiction, on which the theory of adoption is founded, invests an adopted son with the *status* of a natural-born son, except in cases excluded from the operation of the fiction either expressly or by necessary and clear implication. The District Judge further observes:—"The mother appears to be preferred on account of the merit which she possesses in reference to her son, from having conceived and nurtured him in her womb. Clearly this ground is absent in the case of an adoptive mother." This last sentence begs the whole question. The ground is absent only if we drop the whole theory of adoption, based on a legal fiction according to Hindu Law. The same remark applies to the reasoning that

(1) The Mitakshara: Moghe's 3rd Edition, pages 142 and 143.

(2) The Mitakshara: Mogh'es 3rd Edition, page 373, of the Mitakshara.

(3) (1876) 2 Bom. 388 at p. 440.

(4) (1907) 32 Bom. 275 at p. 283; 10 Bom. L. R. 149.

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because the adoption was made by the adoptive father and the adoptive mother had nothing to do with it, therefore, the adoption was for the benefit of the former only and the latter was "no more than the wife of the man who made the adoption". It is now more or less an exploded theory that a Hindu who has no son born to him adopts merely for his spiritual benefit and that secular objects either do not enter into the act or that they enter incidentally. Whatever the spiritual theory which originally gave rise to adoption in Hindu society, its motives and effects are at least as secular as they are spiritual; and an adoption is made as much, if not more, for the purpose of having an heir and continuing the family as for spiritual ends. These latter can, according to the Hindu Shastras, be attained by other means than those of adoption[1]. But there is no secular way of continuing a family except by adoption where there is no son born. Assuming that a Hindu adopts a son for his spiritual benefit, what warrant is there in either Hindu Law or Shastras for the inference that the spiritual benefit secured to the Hindu by his act of adoption does not enure for the benefit of his wife also? As we have pointed out above, for religious purposes and merit, the wife is identified completely with the husband and they form "one body". And this is in accordance with the Dattaka Mimansa:—"In consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted, as son of the wife, is complete in the same manner as her property, in any other thing accepted by the husband." (Dattaka Mimansa, Section I, Section 22: Stokes's Hindu Law Books, page 536). Accordingly, a Full Bench of the Allahabad High Court has held in *Sham Kuar* v. *Gaya Din*[2] that under the Dattaka Mimansa and the Mitakshara, an adopted son succeeds to property to which his adoptive mother succeeded as heiress to her father.

(1) 1. As Manu says, "many thousands of Bráhmins having avoided sensuality from their early youth, and having left no issue in their families, have ascended nevertheless to heaven" [Manu V, 159—161, Bhattacharya's Hindu Law, 2nd Edn., page 15. See also West and Bühler's Hindu Law, 3rd Edn., page 905, Note (*a*). Manu's text is cited with approval by Vijnaneshwara in the Mitakshara; Moghe's 3rd Edn., page 194].

(2) (1876) 1 All. 255.

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For these reasons the decree appealed from must be reversed and the point on which the District Court has decided the appeal being substantially of a preliminary character, the case must be remanded to that Court for disposal according to law. Costs of this second appeal must be paid by the respondents. Other costs to abide the result.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909.

March 23.

GULABCHAND PARAMCHAND (ORIGINAL DEFENDANT 1), APPELLANT, *v.* FULBAI KOM HARICHAND RAMCHAND AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 5), RESPONDENTS.*

Indian Contract Act (IX of 1872), sections 2 (g) (h), 20-35, 65—Indian Trusts Act (II of 1882), section 84—Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two.

By an agreement made between the parties the plaintiff promised to pay the sum of Rs. 1,800 to the defendant as consideration for the latter's promise to marry his niece to the plaintiff's son. But before the marriage could take place the plaintiff's son died of plague. Under the agreement, however, the plaintiff had before her son's death paid to the defendant the sum of Rs. 750. Subsequently the plaintiff having brought a suit to recover that sum, the defendant contended that the agreement being by way of marriage brokerage was void as opposed to public policy and, therefore, under section 65 of the Indian Contract Act (IX of 1872) no sum paid under it could be recovered.

Held, that having regard to the character of the agreement between the parties the plaintiff was entitled to recover the sum from the defendant.

Section 65 of the Indian Contract Act (IX of 1872) provides for the restitution of any advantage received under a contract or agreement. The section preserves the distinction between agreement and contract which is maintained throughout the Act. The section speaks generally of an agreement discovered to be void without any express reference to the cause or origin of the void character, so that an agreement which is void by reason of a principle of law would not on that account fall outside the scope of the section.

* Second Appeal No. 258 of 1908.

1909.

GULABCHAND v. FULBAI.

SECOND APPEAL from the decision of R. D. Nagarkar, First Class Subordinate Judge of Poona, with Appellate Powers, confirming the decree of Dahyabhai R. Dalal, acting Subordinate Judge of Bárámati.

The plaintiff sued to recover from the defendants Rs. 965-13-0 under the following circumstances:—The plaintiff had a son named Ramchand and defendant 1 had a niece named Mainabai, who was the daughter of defendant 1's brother Motichand, deceased, and his widow Gangabai, defendant 5, and sister of Devchand, defendant 4. Defendants 2 and 3 were the brothers of defendant 1. Defendant 1 being the manager of the joint family of which all the defendants were members agreed to give his niece the said Mainabai, a minor, in marriage to plaintiff's son Ramchand and the plaintiff consented to give to defendant 1 Rs. 1,800 as *Daffa*[1] money. Out of the said sum the plaintiff paid to defendant 1 Rs. 500 and Rs. 250 on the 6th and 12th October 1902, who passed to the plaintiff receipts for the same. On the 20th October 1902, the plaintiff paid Rs. 150 to one Fulchand Tarachand on behalf of defendant 1. Thus the plaintiff paid to defendant 1 Rs. 900 in all and the balance of Rs. 900 was to be paid at the time of the marriage. But the marriage did not take place as the plaintiff's son Ramchand died of plague on or about the 25th October 1904. Thus the performance of the marriage having become impossible the plaintiff asked defendant 1 for the return of Rs. 900 and as he refused to do so, the plaintiff brought the present suit for the recovery of the amount with interest thereon, namely, Rs. 65-13-0.

Defendants contended *inter alia* that defendant 1 was not the manager of the family but as he was the eldest member he was merely called at the negotiations of the betrothal according to the custom of their caste; that only Rs. 750 were paid to defendant 1 who gave the said amount to Mainabai's brother and mother and passed receipts to the plaintiff in his name, because he was the eldest member but he had not derived any benefit

(1) *Daffa* money means a reward given to the person standing in *loco parentis* to the girl for settlement of the marriage and is undistinguishable in principle from marriage brokerage.

from the amount and was not liable for it; that the payment of the *Daffa* money being against public policy the plaintiff could not recover it; that there was no agreement to return the amount and the suit was not maintainable as the plaintiff did not celebrate the marriage during Ramchand's life-time; and that the marriage could not be solemnized because Ramchand had said he would not do it and so the defendants were not liable for the return of the amount.

The Subordinate Judge found that defendant 1 was liable for plaintiff's claim; that the plaintiff paid Rs. 750 to defendant 1 for himself and for the joint benefit of all the defendants; that the plaintiff had a right to claim back the amount from the defendants, and that the claim was opposed to public policy. He, therefore, passed a decree for the plaintiff for Rs. 750. His reasons were as follows:—

Defendant No. 1 agreed to give his niece in marriage to plaintiff's son in consideration of her giving Rs. 1,800 to him as *Daffa*. That this sum was to be paid to the bride's guardian in consideration of his giving his ward in marriage is quite clear. *Daffa* means the money taken by persons in *loco parentis* to the girl for giving her away in marriage. The plaintiffs' as well as the defendants' witnesses all agree in saying so. That this money was to be paid to the person entitled to give away the girl in marriage and not to the bride or to the couple is evident from the document of betrothal (Exhibit 41) not mentioning the stipulation about the sum of Rs. 1,800. In the document of betrothal no reference is made to this sum because it goes to the person who, if not satisfied, would break off the match, and who would not like that such a monetary payment to him should appear in this document which will be read by many members of his caste. The reason is that acceptance of such a reward is looked down upon with contempt by the community. It is forbidden by Hindu Law and it is nothing but the selling price of the girl. The view that this was given by way of reward to obtain the guardian's assent to the marriage and not by way of a provision for or gift to the bride receives support from the plaintiff's statement in her deposition (Exhibit 62) that "defendant No. 1 said that he was the person entitled to give away the girl in marriage and therefore the money was given to him. I do not know who was to get the money, but I gave it to Gulabchand (defendant No. 1)." If the money was to go to the bride the plaintiff would have stated that the bride was to get the money instead of saying that she did not know who (*i. e.*, which of the defendants) was to get the money. No attempt or suggestion has been made by the plaintiff to show that this was a gift intended for the bride. Though men know that it is disgraceful to accept money for giving away their girls in

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marriage they do not know that such acceptance is regarded by law as unlawful and it is on this account, that witnesses or parties interested in concealing the true nature of this monetary payment have not made any attempt to do it. Now turning to the question whether such an agreement which entitles a guardian to be paid money in consideration of his giving his girl in marriage is legal or unlawful as being against public policy, it is obvious that such an agreement is derogatory to the happiness and welfare of the child as it acts as an incentive to the guardian to have regard to considerations other than the child's happiness in marrying her into another's family. The child is given away to the highest bidder without having the least regard for her welfare. She is actually sold to the highest bidder without caring to know whether the child's life is likely to be miserable or not. Hindu Law forbids and treats with contempt such contracts. The law is quite settled on this point, it regards such agreements as against public policy, *vide* I. L. R. 22 Bom. 658.

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Now I turn to the important issue whether plaintiff has a right to claim back the amount. The defendants attempt to take advantage of the unlawfulness of the agreement by way of a defence to the plaintiff's claim. It is to be observed that in the present case the marriage being not solemnized the illegal purpose has not been carried out. Not only that, but the defendants assert that the boy Ramchand refused to carry it out and they have tried to substantiate their statement by proving a letter written by the boy to the defendant No. 1 (Exhibit 66). Had the illegal purpose been carried out, the money paid could not have been recovered back ; nor could an action by the defendants have lain to recover the amount promised to them in consideration of their giving their girl in marriage. Thus the present case is quite distinguishable from cases where the illegal purpose has been carried out. It may also be observed that the plaintiff would not have been willing to make such a payment if the defendants had offered to give their ward in marriage to her son without demanding such money. But the greedy guardians who want to make the marriage of their ward a source of gain to themselves would not give her to the plaintiff's son unless she promises to pay.

The payment takes place under circumstances practically amounting to coercion and the plaintiff has no alternative but to submit to the terms dictated by them. The Calcutta High Court has in *Ram Chand Sen* v. *Audaito Sen*, (I. L. R. 10 Cal., 1054) allowed such a claim, and Tyabji, J., has while referring to the Calcutta case at page 665 of I. L. R., 22 Bom. expressed his opinion that payment of money made to a father can be recovered if already paid when the marriage is not performed. In this case also it is manifest justice that defendants should not be allowed to retain the money, the justice of the claim being entirely with the plaintiff.

On appeal by defendant 1 and cross-appeal by the plaintiff the decree was confirmed. The following is an extract from the appellate Court's judgment :—

On 5th October 1902 (Exhibit 41), there was executed by the defendant No. 1 a document of betrothal, under which it was agreed that the niece of defendant No. 1, who is also the daughter of the defendant No. 5, should be given in marriage to the plaintiff's son, since deceased. The plaintiff agreed to pay the defendant No. 1 Rs. 1,800 besides as *Daffa*. This is practically a reward given to the person standing in *loco parentis* to the girl for settlement of the marriage and is undistinguishable in principle from marriage brokerage. The *Daffa* amount is not mentioned in the document of betrothal. The lower Court came to the conclusion that the agreement to pay *Daffa* was opposed to public policy. This finding was not challenged by the appellant's pleader in either appeal; but the case was argued on other points without disputing this finding. I agree with the lower Court on the evidence that the agreement in the present case is opposed to public policy.

The next question is whether the plaintiff is entitled to recover such *Daffa* money as she might be proved to have paid to the defendant No. 1 on the ground that the illegal purpose of the agreement was not carried out owing to the death of the boy the bridegroom elect, before the celebration of the marriage. I think the lower Court correctly decided the point in the affirmative following the Calcutta ruling *Ram Chand Sen* v. *Audaito Sen*(1) of which Tyabji, J., has expressed his approval at p. 665 *et sequens* in I. L. R., 22 Bombay. In the Calcutta case the guardian of the girl had married her to another boy in breach of the agreement with the plaintiff thereby committing a sort of fraud on the plaintiff. This feature is absent in the present case; but still the principle of the ruling applies and the equity is in the plaintiff's favour as remarked by the lower Court.

Defendant 1 preferred a second appeal and the plaintiff presented cross-objections.

D. A. Khare for the appellant (defendant 1):—We contend that the agreement between the parties was in the nature of a marriage brokerage and was therefore void as opposed to public policy. The plaintiff, therefore, cannot recover the sum paid under such an agreement: see section 65 of the Indian Contract Act. That section provides for the restitution of any advantage received under a contract or agreement in two cases only. The first case is where "an agreement is discovered to be void," and the other "where a contract becomes void." In the present case the contract was void from the beginning. Therefore, the case does not fall under the section which applies to agreements

(1) (1884) 10 Cal. 1054.

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which are not void at the outset on account of some illegality known to the parties. We rely on *Dayabhai* v. *Lakhmichand*[1].

M. V. Bhat for the respondent (plaintiff) was not called upon.

BATCHELOR, J.:—By an agreement made between the parties to this suit the plaintiff promised to pay the sum of Rs. 1,800 to the first defendant as consideration for the first defendant's promise to marry his niece to the plaintiff's son. But before the marriage could take place the plaintiff's son died of plague. Under the agreement, however, the plaintiff had, before her son's death, paid to the first defendant a sum which the lower Courts have ascertained to be Rs. 750. The question is whether, having regard to the character of the agreement between the parties, the plaintiff is entitled to recover this sum from the first defendant. Both the Courts below have decreed the claim, and the first defendant now appeals from that decree.

The only ground upon which the decree is attacked has reference to the character of the agreement between the parties. It is contended that that agreement, being an agreement by way of marriage-brokerage, is void as opposed to public policy, and therefore, under section 65 of the Contract Act, no sum paid under it can be recovered.

In *Dholidas* v. *Fulchand*[2] it was held by a Division Bench of this Court that such an agreement as that now in question is void as opposed to public policy under section 23 of the Contract Act, and this decision is binding upon us. That being so, it is urged by the Honourable Mr. Khare that the only principle of law on which in India money paid under a void agreement can be recovered is contained in section 65 of the Contract Act; and that the language of this section shuts out such a claim as this.

The section provides for the restitution of any advantage received under a contract or agreement in two cases, of which the first is the case where "an agreement is discovered to be void." It is urged that the agreement before us was never discovered to be void, but was void *ab initio*. That, however,

(1) (1885) 9 Bom. 358. (2) (1897) 22 Bom. 658.

is we think, precisely the case contemplated by the section, where the word "agreement," used in sharp antithesis to the word "contract" in the second branch of the sentence, clearly denotes an agreement which, being void *ab initio*, never reached the stage of contract. In this respect section 65 merely preserves the distinction between agreement and contract which is maintained throughout the Act—e.g., sections 10, and 20 to 30—in compliance with the interpretation clauses (g) and (h) of section 2. It will be observed, moreover, that the section speaks generally of an agreement discovered to be void without express reference to the cause or origin of the void character, so that such an agreement as this, void by reason of a principle of law, would not on that account fall outside the scope of the section. It is true also that there seems the less justification for any attempt to circumscribe the wide language of the Act seeing that the section purports on its face to substitute one broad, general principal for the numerous and somewhat technical rules, with their qualifications, which obtain in English Law on the subject. So far, then, the matter seems to be free from complexity.

But, apart from the observations in *Dayabhai* v. *Lakhmichand*[1] which scarcely seem to have been necessary to the decision arrived at, the use of the word "discovered" introduces certain difficulties in the application of the section to an agreement which is void under section 23 by reason of an unlawful consideration or object; and we are therefore of opinion that this appeal should be decided on a somewhat different ground.

It will be observed that what section 65 provides for is a suit to recover any advantage received by the defendant under the agreement or to obtain compensation therefor. But what the plaintiff in this suit seeks is the recovery of a definite sum of money paid to the defendant. In the recent case of *P. R. and Co.* v. *Bhagvandas*[2] we have held that a suit for a debt or liquidated money demand can still be maintained, as it could formerly have been maintained under the *indebitatus* counts, and we think that the present suit should be regarded as a suit for money had and received. Such suits were held to lie wherever the defend-

(1) (1885) 9 Bom. 358. (2) (1909) 11 Bom. L. R. 335.

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ant was "obliged by the ties of natural justice and equity to refund the money": per Lord Mansfield in *Moses* v. *Macferlan*[1]. The rule was, no doubt, subsequently restricted in its operation, but in such a case as this, where no material part of the illegal purpose has been carried into effect, the payment has always been held to be recoverable; See *Kearley* v. *Thomson*[2], *Herman* v. *Jeuchner*[3], *Wilson* v. *Strugnell*[4] and *Taylor* v. *Bowers*[5].

The principle of law applied in this view of the case is recognised and illustrated in section 84 of the Trusts Act, and has been adopted by the Courts in India in numerous cases. Reference may, for instance, be made to *Mulji Thakersey* v. *Gomti*[6], where not only the ornaments and clothes, but also the Rs. 700 *upariyaman* paid to the father of the intended bride were held to be recoverable; and to *Dholidas'* case[7], where Tyabji, J., expressed the opinion that payments under such an agreement as this may be recoverd if the marriage has not taken place. This was also the view followed by a Division Bench in Calcutta in *Jogeswar Chakrabatti* v. *Panch Kauri Chakrabatti*[8], which was approved in *Ram Chand Sen* v. *Audaito Sen*[9], where Garth, C. J., says that in such a case "it is manifest justice that the defendants should not be allowed to retain the money." We concur in this opinion and on the above grounds we affirm the decree of the lower appellate Court and dismiss this appeal with costs. The cross-objections are also dismissed with costs.

Decree affirmed.

G. B. R.

(1) (1760) 2 Burr. 1005 at p. 1012.
(2) (1890) 24 Q. B. D. 742.
(3) (1885) 15 Q. B. D. 561.
(4) (1881) 7 Q. B. D. 548.
(5) (1873) 1 Q. B. D. 291.
(6) (1887) 11 Bom. 412.
(7) (1897) 22 Bom. 658.
(8) (1870) 5 Ben. L. R. 395.
(9) (1884) 10 Cal. 1054.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.
April 5.

MURLIDHAR NATHU GUJRATHI (ORIGINAL PLAINTIFF), APPELLANT, *v.* VALLABHDAS MURLIDHAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Guardians and Wards Act (VIII of 1890), section 41—Guardian—Order of discharge by the Court—Liability of the guardian to suit.

When a declaration is once made by the Court, under section 41 of the Guardians and Wards Act, 1890, discharging a guardian from liability, the latter cannot be exposed to suits in connection with the management of the minor's property except in the case of fraud discovered after the declaration.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, confirming the decree passed by R. B. Khamgaonkar, Subordinate Judge at Yeola.

One Khemchand (father of defendants 2 and 3) was appointed by the Court a guardian of the property of a minor named Bhagirathi (wife of plaintiff). Bhagirathi died a minor leaving her surviving an infant daughter and her husband (plaintiff). The daughter died in 1903, whereupon the plaintiff became entitled to the property as her heir.

Among the properties which came under Khemchand's administration as guardian was a sum of money deposited with the firm of Gangaram Chhabildas (managed by Vallabhdas Murlidhar, defendant 1). The firm continued crediting interest over the amount at 4½ per cent. up to 1893-94, after which no interest was credited. Khemchand allowed the matter to rest as it was.

In 1904, Khemchand applied to the Court for a discharge from the guardianship: it was granted in spite of the plaintiff's objection.

In 1906, the plaintiff sued the manager of the firm Gangaram Chhabildas (defendant 1) and the sons of Khemchand (who

* Second Appeal No. 402 of 1908.

1909.

MURLIDHAR v. VALLABHDAS.

died in the meanwhile) (defendants 2 and 3). The prayers were: first, to recover the balance of amount due at compound interest from the date of last crediting of interest less the amount already paid: and, secondly, to recover damages from defendants 2 and 3, as representing Khemchand, for fraud and negligence in not properly dealing with the sum.

The Court of first instance held that the first defendant did not owe anything to the estate: that Khemchand had not acted fraudulently or negligently in not recovering the debt sooner: and that his estate was therefore not liable.

On appeal this decree was confirmed by the lower appellate Court. The District Judge remarked:—

"I cannot say that Khemchand did his duty as a guardian should. Having ascertained that this money was lying at call without interest, being a very much larger sum than was needed for current expenses, he ought to have withdrawn it and deposited it with some bank, or in some good securities which would have brought in income to the estate, instead of allowing it to lie without profit for so many years. That is what a prudent man would do with his own funds, and, accordingly, that is what a guardian ought to do with his ward's money. It is not enough to say that Gangaram Chhabildas was a perfectly safe firm and the money could be nowhere so safe as lying at call there. There are other equally safe investments which would have brought in a reasonable amount of interest. The action of Khemchand was therefore negligent, but this does not give the plaintiff any right of suit against Khemchand, because Khemchand was discharged by the District Court and that is a protection to him against all suits, except on the ground of subsequently discovered fraud. Now, there is no fraud at all here; he did not allow this money to lie in the hands of Gangaram for any corrupt or fraudulent reason; he made no profit out of it to the prejudice of his ward. His act is not even *crassa negligentia*, whereby positive loss, easy to be foreseen, has occurred; he has merely incurred a negative loss. I am of opinion then that the suit must fail against Khemchand also."

The plaintiff appealed to the High Court.

S. S. Patkar for the appellant.—It is found as a fact that the action of the guardian was negligent: but the lower Court has held that the order of discharge by the District Court was a protection to him against all suits except on the ground of fraud subsequently discovered. We submit the discharge is

operative only so far as regards any action that may be taken under the Guardians and Wards Act, 1890, against the guardian. But it does not take away the right of the minor or his heir to proceed against the guardian by a regular suit to enforce his liability under the common law.

D. A. Khare for defendant No. 1.

G. S. Rao for defendants Nos. 2 and 3.—The discharge of the guardian protects him and a subsequent suit does not lie. Under cl. (4) of s. 41 of the Guardians and Wards Act, 1890, when the guardian has delivered property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered. There is no allegation of fraud.

Even as regards negligence the lower Court says that the guardian's act is not even *crassa negligentia*. The maxim *actio personalis moritur cum persona* applies and therefore the heirs of the guardian are not liable.

S. S. Patkar in reply.

CHANDAVARKAR, J.:—The lower Courts have rightly, in our opinion, held that the first respondent is not answerable to the claim of the appellant.

The question is as to the liability of the second and the third respondent. Their father had been a guardian appointed by the Court and, when the minor died, the Court made a declaration discharging him so far as his liabilities under the Guardians and Wards Act were concerned. Under s. 41, cl. (4), of the Guardians and Wards Act, when a guardian has delivered any property in his possession or control belonging to the ward or accounts as required by the Court, "the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered." Such a declaration has the effect of protecting the guardian from all suits in connection with the management of the minor's property except in the case of fraud discovered after the declaration. No such fraud is found proved in the present case; but it is contended for the appellant that the declaration actually made by the

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Court saves the guardian only from suits concerning liabilities arising under the Guardians and Wards Act, not from those arising under the common law. Assuming such a distinction to exist between the liabilities under the Act and those under the ordinary law, here the complaint is that the second respondent invested his ward's money in an imprudent manner by letting it lie as a deposit without interest with the first respondent. That means that the second respondent did not deal with his ward's property in the manner he was bound to deal with it by the provisions of section 27 of the Act. That section says that "a guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own." A man of ordinary prudence invests his money for interest; and this is what the father of the second and third respondents failed to do in respect of his ward's money. There can be no question in this of any liability outside the Act. It arises under the Act itself. The order of the Court discharging the second respondent is therefore a complete protection to him, so far as the present claim goes.

The decree of the Court below must, therefore, be confirmed with costs, separate sets being allowed in the case of the first respondent and the second and third respondents.

Decree confirmed.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR *v.* MAVSING BECHAR.*

1903.
February 25.

Criminal Procedure Code (Act V of 1898), section 269—Trial by Jury—Trial with the aid of assessors—Difference in the modes of trial—Accused if prejudiced can complain—Practice—Procedure.

The accused were tried with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively.

The Judge charged the jury and asked for their verdict on both the charges in the manner prescribed for jury trials. He agreed with the verdict and sentenced the accused to various terms of imprisonment. The accused appealed on the grounds that the learned Judge erred in omitting to take the opinion of the jurors as assessors on the second charge and to write a judgment.

Held, that the law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain.

APPEAL from convictions and sentences recorded by Dayaram Gidumal, Sessions Judge of Ahmedabad.

The facts of the case were as follows :—

The accused were tried by the Sessions Judge of Ahmedabad with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively.

The jury returned a verdict of not guilty as regards some of the accused: the Sessions Judge accepted the verdict and acquitted them; as regards the remaining accused, the jury returned a verdict of not guilty on the charge of murder but found them

* Criminal Appeal No. 442 of 1902.

1909.

EMPEROR v. MAYSING.

guilty of rioting and causing grievous hurt. The Judge accepted the verdict and sentenced the accused to various terms of imprisonment.

The accused appealed to the High Court, contending, *inter alia*, that the Sessions Judge was in error in treating the trial as though it was a trial by jury on all counts and in treating their verdict on all the counts as the verdict of a jury contrary to the provisions of section 269 of the Criminal Procedure Code, and that the irregularity involved in accepting the verdict at the last moment as a verdict of the jury and not as the opinion of assessors seriously prejudiced the accused.

L. A. Shah, for the accused.

M. B. Chaubal, Government Pleader, for the Crown.

CHANDAVARKAR, J.—The preliminary point urged in this appeal is that the trial having been as a matter of fact conducted by the Sessions Court as one with the aid of assessors, as far as the charges for the offences of which the appellants have been convicted are concerned, the learned Sessions Judge has erred in law in that he omitted to take the opinions of the jurors as assessors in the manner required by the Criminal Procedure Code and to write a judgment. It may be that, as Mr. Shah for the appellants states, throughout the trial both the Judge and the pleaders understood the trial to be one with the aid of assessors, for the purposes of the charges abovementioned. But, however that be, as a matter of fact, after the learned Judge had charged the jury he asked for their verdict on all the charges in the manner required by the provisions of the Code of Criminal Procedure relating to jury trials. At that moment the appellants' pleader might have intervened and asked the Judge to deal with the trial as to the specific charges with which we are concerned in this appeal as one by the Court with the aid of assessors and to take the opinions of the jurors as assessors in the manner provided by the Code. The law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are

respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain. But that was not done and the Judge was allowed to deal with the whole case as one tried by a jury. Under these circumstances it is too late now for the appellants to urge successfully that the Judge's action should be corrected. We must deal with the appeal as one from the verdict of a jury, to which the Full Bench decision in *King-Emperor* v. *Parbhushankar*[1] applies.

HEATON, J.—I have a few words to add as to the facts of this case. The question we have to determine is a question of fact: whether the trial was by a jury or with the aid of assessors. We find that the Judge charged the jury on the case as a whole and directed them to give a verdict on each of the charges. He did not direct them to give a verdict on the charge of murder only and to give their opinions as assessors on the minor charges. This is the more apparent when we see, as the proceedings show, that the Judge had twice to question the jury in order that he might obtain from them a specific verdict on charges as to which otherwise they would not have given a verdict at all. The record also shows that the verdict of the jury was taken on each charge and that as to no charge at all was their opinion taken as if they were assessors. Then the Judge accepted the verdict of the jury. He wrote no judgment but merely sentenced the accused (the appellants) for those offences of which the jury had found them guilty. That procedure seems to me to show conclusively that the trial was a trial by a jury.

R. R.

(1) (1901) 25 Bom. 680; 3 Bom. L. R. 278.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor, and Mr. Justice Heaton.

1909. *March* 26.

THE HITWARDHAK COTTON MILLS Co., LIMITED, APPLICANT, *v.* SORABJI DINSHAW KARAKA.*

Indian Stamp Act (II of 1899), section 2 (5) (b)—Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document.

The transactions comprised in a document consisted of a transfer of a mortgage secured on a cotton mill and an agreement that the transferee should lend money at the request of the transferor to the mortgaged mill for making improvements, additions and repairs and for the working of the mill.

A question having arisen as to what was the proper stamp duty payable on the document,

Held that the document was only liable to stamp duty as a transfer of mortgage and as an agreement, that is, to Rs. 5-8-0 in all.

An agreement to lend money does not create an obligation to pay money within clause (5) (*b*) of section 2 of the Indian Stamp Act (II of 1899).

An agreement to lend money to a partnership is not capable of specific performance and it creates no debt although the breach of it may give rise to a claim for damages.

REFERENCE by R. P. Barrow, Commissioner, Northern Division, under section 57 (*a*) of the Indian Stamp Act (II of 1899).

The terms of the reference were :—

An instrument, which the parties thereto meant to be a partition deed was drawn up on the 29th June 1907 between the Directors of the Ahmedabad Fine Spinning and Weaving Company, Limited, and the Firm of Sorabji Dinshaw Karaka and Company.

The Firm of Sorabji Dinshaw Karaka and Company entered into an agreement with the Hitwardhak Cotton Mills Company, Limited, on the 6th April 1904 by which the firm was appointed the Agents of the Company on certain conditions.

In pursuance of the said agreement the firm from time to time advanced money aggregating Rs. 4,08,085-4-2 to the Company, repayment of the sum

* Civil Reference No. 6 of 1908.

being made a first charge on the property of the Company. The instrument mentioned in the first para shows that the greater part of this money was borrowed from the Ahmedabad Fine Spinning and Weaving Company, Limited, by Mr. Sorabji Dinshaw Karaka who was also the Managing Agent thereof. By this instrument the firm transferred to the Ahmedabad Fine Spinning and Weaving Company, Limited, its interest in the first charge over the property of the Hitwardhak Cotton Mills Company, Limited, which had been acquired under the agreement of April 1904. The firm further bound itself to pay to the Ahmedabad Fine Spinning and Weaving Company, Limited, one-half of the commission from the Hitwardhak Cotton Mills Company, Limited, to which it was entitled under the aforesaid agreement. In consideration of this transfer of interest the Ahmedabad Fine Spinning and Weaving Company undertook (1) to confirm the loan already advanced by the firm to that Company and (2) to advance a further loan up to Rs. 4,50,000 if required by Mr. Sorabji Dinshaw Karaka for additions to or improvements in the machinery or plant and building, &c., and (3) to advance such money as working capital as might be required by Mr. Sorabji in the working of the mill. The instrument embodying these conditions which purports to be a deed of partnership bears a stamp of Rs. 15. The Sub-Registrar of Ahmedabad before whom the document was produced for registration held that the transfer of interest secured by the firm by way of first charge over the Hitwardhak Mill and half commission came under Article 62 (*c*) 2 of the first Schedule of the Stamp Act of 1899 and required a stamp of Rs. 5. As regards the advance of up to Rs. 4,50,000 he considered that it fell under the defination of a bond and that the duty leviable was that chargeable on a bond under clause 15 of the Schedule. Being in some doubt however as to the correctness of his opinion he referred the question for decision to the Collector. The Collector then consulted the Government Pleader as to the amount of the duty leviable and the latter has advised that the document should be taken to be a transfer under Article 62 (*c*) 2 of the Schedule and an agreement as regards the three conditions—

(1) Transfer of half commission,

(2) Advance of Rs. 4,50,000,

(3) Advance as working capital made.

According to his opinion the stamp duty leviable would be Rs. 6-8-0 in all.

The Collector then, holding that since the document embodies various conditions of transfer of interest secured by the firm and an undertaking on the part of Ahmedabad Fine Spinning and Weaving Company, Limited, to advance money, it should be taken as a transfer under Article 62 (*c*) 2 and a bond under Article 15, as regards the sum of Rs. 4,50,000, referred the question for decision to the Commissioner under section 56 of the Stamp Act.

The Inspector-General of Registration whose opinion has since been taken refers to the decision of the Full Bench of the Madras High Court in Indian Law Report 15 Madras, page 193, and agrees with the Collector except with

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regard to that part of the instrument which contains an agreement to advance money for working capital. He considers that since the amount was not ascertainable when the deed was drawn up the duty should be 8 annas only under Article 5 (*b*), Schedule I, the total duty leviable being Rs. 5 + 2,250 + annas 8, or Rs. 2,255-8-0.

The Commissioner's opinion was that the Inspector-General's view was apparently correct, but as the amount of duty involved was large and agreements of the nature referred to were not uncommon, the present reference was made under section 57 (*a*) of the Indian Stamp Act (II of 1899) for an authoritative decision.

M. B. Chaubal, Government Pleader, appeared for the Government.

There was no appearance for the parties.

SCOTT, C. J.:—The transactions comprised in the document which is the subject of this reference consist of a transfer of mortgage by S. D. Karaka to the Ahmedabad Fine Spinning and Weaving Company and an agreement *inter alia* that the company shall lend money at the request of S. D. Karaka for making improvements, additions and repairs to the building and machinery of the Hitawardhak Cotton Mills up to an unascertained though ascertainable amount and also such money as may be required for working the said mills.

It has been argued on behalf of the Revenue Authorities that the agreement to lend money for repairs and improvements is a bond within the meaning of the Indian Stamp Act, 1899, section 2 (5) (*b*).

By that clause it is provided that "bond" shall include any instrument attested by a witness and not payable to order or bearer whereby a person obliges himself to pay money to another.

In our opinion an agreement to lend money does not create an obligation to pay money within the meaning of this clause. An agreement to lend money to a partnership is not capable of specific performance (see *Sichel* v. *Mosenthal*[1]); and it creates

(1) (1862) 30 Beav. 371.

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no debt though the breach of it may give rise to a claim for damages: see *South African Territories* v. *Wallington*[1].

We hold that the document is only liable to duty as a transfer of mortgage and as an agreement, *i. e.*, to Rs. 5-8-0 in all.

Order accordingly.

G. B. R.

(1) [1898] A. C. 309.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909.
April 2.

TRIMBAK MAHADEV TILAK (ORIGINAL OPPONENT NO. 3), APPLICANT, *v.* NARAYAN HARI LELE AND ANOTHER (ORIGINAL PETITIONER AND OPPONENT NO. 1), OPPONENTS.*

Indian Trusts Act (II of 1882), section 34—Executor—Trustee—Advice of Court as to administration of property—Executor continuing as such—Administration suit.

So long as an executor occupies that position, he cannot claim the advantages provided for trustees by section 34 of the Indian Trusts Act (II of 1882). If he feels any doubt as to the manner in which he should administer the estate come to his hands, his remedy is to file an administration suit.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of C. A. Kincaid, District Judge of Poona.

The facts of the case were that on the 25th April 1900 one Vishnu Mahadev Tilak made a will appointing under it Narayan Hari Lele and Ganesh Narayan Khare executors and his brother Lakshman Mahadev Tilak *alias* Anna Tilak residuary legatee. In the will the property of the testator was valued at Rs. 7,100 and the directions as to its disposal were as follows:—

Rs. 2,000 for the marriage of the testator's daughter Varubai.

* Application No. 72 of 1909 under Extraordinary Jurisdiction.

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Rs. 4,000 to be given to the testator's wife Yamunabai.
Rs. 2,000 ornaments.
Rs. 2,000 cash.

4,000

Rs. 500 to be given to Varubai—ornaments on her person.

Rs. 300 to be given to Sonubai.

Rs. 300 to be given to Lakshman Mahadev *alias* Anna Tilak.

7,100

The testator died on the 25th February 1903 and the said Narayan Hari Lele obtained probate of the will on the 29th July 1904. When the executor began to administer the estate, he found difficulty in giving effect to the instructions in the will. He therefore submitted the following points for advice and guidance by the District Judge :—

(1) The testator had insured his life for Rs. 3,500 and the life policy was assigned by him to his wife Yamunabai who, after her husband's death, recovered the amount of the policy. This being so, whether Yamunabai should be paid Rs. 4,000 as directed in the will over and above the amount of the policy, or whether the difference in that amount and the amount of the policy, namely, Rs. 500 only.

(2) Rs. 800 only were spent on account of the marriage of Varubai, while the will directed that Rs. 2,000 should be spent for that purpose. Therefore, whether she should be paid Rs. 1,200 more.

(3) In the will the estate was valued at Rs. 7,100 while when the probate was taken the value of the property was found to be Rs. 5,104. Thus the estate being not sufficient to meet the legacies, whether the legatees should be given rateable distribution.

On the above points the Judge expressed his opinion as follows :—

(1) Yamunabai was entitled to receive Rs. 4,000 independently of the amount of the life policy which was not mentioned in the particulars of property given in the will.

(2) Rs. 800 only being spent for Varubai's marriage she was not entitled to the balance of Rs. 1,200, because Rs 2,000 were specifically granted for her marriage.

(3) If the estate had so shrunk that the legacies could not be paid, the legatees must be contented with rateable distribution.

Further the Judge opined that Trimbak Mahadeo Tilak, who claimed as the undivided heir and brother of the testator, had no *locus standi* as a residuary legatee. He was entitled only to a rateable distribution of the specific legacy of Rs. 300. All the legacies must be satisfied in full before he could claim as a residuary legatee.

Being dissatisfied with the above expression of opinion, Trimbak Mahadeo Tilak preferred an appeal and in the alternative an application for revision under the extraordinary jurisdiction, section 622 of the Civil Procedure Code, Act XIV of 1882.

K. H. Kelkar (with *P. D. Bhide*) appeared for the applicant Trimbak Mahadev Tilak:—We submit that the Judge had no jurisdiction under section 34 of the Indian Trusts Act to move in the matter. This contention was raised in the lower Court. Section 34 of the Act applies to trustees and not to executors. An executor is not a trustee under the section and so he cannot ask for the opinion of the Court. The powers of an executor are given in section 90 of the Probate and Administration Act and there are similar provisions in section 269 of the Indian Succession Act. There is a distinction between the office of an executor and that of a trustee: see Snell's Equity, pp. 165 and 169 (12th Edn.). An executor can at the most be said to be a constructive trustee. But section 34 of the Indian Trusts Act does not apply to constructive trustees. The term trustee is defined in the Act. See also Walker on Executors, p. 308 (3rd Edn.), and Godefroi and Lewin on Trusts. These authorities bear out our contention that an executor is not a trustee. The ruling in *In the Goods of Nundo Lall Mullick*[1] lays down the distinction between an exceutor and a trustee. An executor has the widest powers of disposition and is not subject to the authority of the Court. He cannot ask the opinion of the Court on any point. The legatees can seek redress

(1) (1896) 23 Cal. 908.

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by bringing a suit. In the present case the executor's opinion was in favour of the applicant. Moreover all the parties concerned were not before the Court. Therefore, the Judge had no jurisdiction to express his opinion in the matter. The executor becomes a trustee after he has given full effect to the terms of the will. See *In re Mackay*[1].

There was no appearance for the opponents.

SCOTT, C. J.:—The executor of one Vishnupant Tilak applied to the District Court of Poona for its opinion under section 34 of the Indian Trusts Act with regard to the administration of the trust property of the testator.

Some of the parties interested as beneficiaries under the will were present at the time of the application, and those parties appear to have agreed that the Court should advise the executor under section 34 of the Trusts Act. An opinion was accordingly expressed by the District Judge upon the points preferred for the Court's opinion by the executor, but one at least of the beneficiaries was absent and not consenting.

One of the parties who had consented to this method of disposal of the question having found that the opinion of the Court was unfavourable to his interests preferred an appeal against that opinion, and, in the alternative, has asked this Court to entertain his objection as made under the revisional jurisdiction of the Court conferred upon it by section 622 of Civil Procedure Code, 1882.

We think that assuming that an opinion was expressed which fell within the powers of the Court under section 34, there is no appeal from such an opinion. We hold, however, that the case presented to the District Judge was not a case falling under section 34; for, the executor who asked for the opinion of the Court had not become a trustee with regard to any of the property in his hands on behalf of the legatees. His difficulty was to decide how much of the property in his hands he should allocate for the benefit of each of the persons named as legatees, and it is in consequence of his inability to decide that that he

(1) [1906] 1 Ch. 25 at p. 31.

came to the Court. It is no doubt true that an executor, when he has assented to a legacy and set aside funds to meet it, becomes a trustee, but, as observed by Mr. Justice Kekewich, in *In re Mackay*[1], the exact moment of passage from the character of executor to that of trustee is difficult to define.

The applicant in this case had not in our opinion become a trustee so as to incur all the liabilities of a trustee. He was still an executor and could as an executor have pleaded limitation against the claims of beneficiaries, and so long as he occupied that position he could not claim the advantages provided for trustees by section 34 of the Indian Trusts Act. His remedy, if he felt any doubt as to the manner in which he should administer the estate come to his hands, was to file an administration suit.

We hold that the opinion of the District Judge was given without jurisdiction, and we therefore direct that the proceedings be set aside.

Proceedings set aside.

G. B. R.

(1) [1906] 1 Ch. 25 at p. 31.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

CHUNILAL PRANSHANKAR (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* SURAJRAM HARIBHAI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT No. 1), RESPONDENTS.*

1909. *April* 5.

BHOGILAL VALABHRAM (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* SURAJRAM HARIBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.†

Hindu Law—Marriage—Asura form—Brahma form—Construction of texts.

Under Hindu Law, where the paternal or maternal relation of a girl, who is given in marriage, receive money consideration for it, the substance of the

* Second Appeal No. 252 of 1908.
† Second Appeal No. 392 of 1908.

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transaction makes it not a gift but a sale of the girl. The money received is what is called the "bride-price": that is the essential element of the *Asura* form. The fact that the rites prescribed for the *Brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The taint of the *Asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her.

It is a principle enunciated by Vijnaneshvara that where all *smritis* are of equal importance and where there is a conflict between two or more writers, the Court is free to choose any it likes.

SECOND appeals from the decision of Dayaram Gidumal, District Judge of Ahmedabad, confirming the decree passed by Chandulal Mathuradas, First Class Subordinate Judge at Ahmedabad.

The material facts are set out in the judgment.

Gokuldas K. Parekh for the defendants:—The finding of the lower Courts that the form of marriage in which Bai Mani was given away was Asura is erroneous. The form of a marriage under Hindu Law is determined by the preliminaries adopted in it. Where, therefore, the preliminaries adopted appertain in fact to the Brahma form of marriage, the marriage is to be taken as performed in the Brahma form, no matter whether the money was paid to the relations of the bride.

In verse 31, chapter 3 of the Manava Dharma Shástra, where the essentials of the Asura form of marriage are defined, the word ज्ञातिभ्य: (*jnatibhyah*) means the paternal kindred. In verse 63 of the Achara Kánda of Yajnyavalkya which enumerates the relatives who are competent to give away a girl in marriage, no mention is made of maternal relations.

In this case, the maternal uncle was appointed guardian of the person of the minor girl by the District Court and was authorised to give the girl in marriage. He was in the position of a stranger or neighbour. If he abused his powers and took money secretly for giving the girl in marriage, that would not affect the form of marriage.

Lallubhai A. Shah for the respondents:—According to Yajnyavalkya the test to determine whether a marriage was in the Asura form or not is the payment of money—आसुरो द्रविणा दानात् (*Asuro dravina danat*). In his Sanskara Mayukha, Nilkantha

describes the Asura form thus: धनेनोपत्तोष्यापेयच्छेत्—(*dhaneno-ptoshyopayachet*) *i.e.*, where one marries after satisfying by means of (paying) money.

The word ज्ञातिभ्य: (*jnatibhayah*) in Manu's verse 31 means no doubt paternal relations. But it is illustrative and not exhaustive. Similarly the text of Yajnyavalkya which enumerates the relatives who are competent to give a girl away in marriage is not exhaustive. See also *Mulchand* v. *Bhudhia*[1].

As money was taken by the maternal uncle for giving the girl in marriage, the marriage assumed the Asura form. The ceremonies gone through may have been pertinent to the Brahma form: that did not change the character of marriage. The test is the payment of money. See *Vijiarangam* v. *Lakshman*[2]; and *Venkatacharyulu* v. *Rangacharyulu*[3].

CHANDAVARKAR, J.—The facts, upon which the questions of law in the two second appeals turn, are shortly these:—

The property in dispute originally belonged to one Dowlatrai Becharlal. He made a will on the 9th of October 1889, and died ten days later, leaving him surviving two daughters, Ladkore and Mani. Mani being a minor, the District Court of Ahmedabad appointed her maternal grandmother Raliata and her maternal uncle Chunilal guardians of her person, and the Názir of the Court guardian of her property, under the Guardians and Wards Act. By the order of appointment the guardians of the person of the minor were enjoined not to give the girl in marriage without the Court's permission. Subsequently Chunilal applied to the Court for permission to betrothe the girl to one Harprasad. The permission was granted, but some disagreement having arisen between Chunilal and Harprasad's grandfather, the former applied to the Court for revocation of the order granting the permission. The Court declined to revoke the order; nevertheless Chunilal gave the girl in marriage to another boy. This was in violation of the Court's order.

(1) (1897) 22 Bom. 812.
(2) (1871) 8 Bom. H. C. R. 244 at p. 256 (O. C. J.).
(3) (1890) 14 Mad. 316 at p. 319.

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Some time after that, Mani lost her husband, and she herself died childless on the 22nd of Novemer 1905.

The respondents Nos. 1 and 2 in Second Appeal No. 252 brought the suit claiming in their plaint the property in dispute, which Mani had left at her death, as reversionary heirs of her father Dowlatrai. They alleged that under Dowlatrai's will the property had come to Mani but with only a life interest in it; and that on her death it descended to them as Dowlatrai's heirs.

At the trial of the suit the said respondents prayed for amendment of the plaint to the effect that Mani had taken an absolute estate in the property under her father's will and that on her death they were entitled to it as her heirs. The amendment was allowed and evidence led accordingly.

Both the Courts below have found upon the evidence that Chunilal gave the girl in marriage by receiving money consideration for the gift. Upon that fact they have held that the marriage was in the *Asura* form. The result of that finding being that on Mani's death her stridhan, in default of her issue, must go to her nearest relations on her father's, not her husband's side, the Courts have given the respondents a decree, holding that they are entitled to the property as Mani's heirs.

The first point of law urged in this Second Appeal (No. 252) from that decree is that the amendment of the plaint ought not to have been allowed, since it transformed the nature of the suit into one of a character inconsistent with that originally brought. At first the respondents claimed the property as Dowlatrai's heirs; subsequently they abandoned that position and claimed as heirs to his daughter Mani. There is no inconsistency if we have regard to the substance of the claim. The respondents claimed the property on the strength of Dowlatrai's will. The Court was asked to construe it and to give the respondents a decree for the property. It was competent for them to abandon their first construction and substitute for it another as the basis of their title.

It is next contended that the finding of the Courts below that the marriage of Mani was in *Asura* form is erroneous in law, be-

cause there is no evidence that her maternal uncle, who gave her in marriage as her guardian, received money as consideration for it. The question is one of fact and its determination must depend on the evidence of surrounding circumstances and probabilities, if direct evidence of payment of money is not forthcoming.

Then it is urged that, assuming that money was received by Chunilal as consideration for the gift of the girl in marriage, that fact will not give the marriage an *Asura* form under the Hindu Law, if the marriage itself was solemnised according to the rites prescribed for the *Brahma* form; and that the Court must presume in the first instance in every case that the marriage was in the latter form.

The *primâ facie* presumption no doubt is that every marriage under the Hindu Law is according to the *Brahma* form; but it can be rebutted by evidence. And here, according to the findings of the Courts below, it has been rebutted.

Where the person who gives a girl in marriage receives money consideration for it, the substance of the transaction makes it, according to Hindu Law, not a gift but a sale of the girl. The money received is what is called bride-price; and that is the essential element of the *Asura* form. The fact that the rites prescribed for the *Brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The Hindu law-givers one and all condemn such benefit and the *Shastras*, regarding it as an ineradicable sin, prescribe no penance for the sale of a bride (see the Agni Puran cited in Shudra Kamalakar, page 108).

Whenever, therefore, it is proved, the Courts must hold the marriage to have been in the *Asura* form, however much it might be disguised by the adoption of the rites of the *Brahma* form. That adoption cannot take away the taint of the lower form.

Under the Hindu law, certain forms are common to both the *Brahma* and the *Asura* form of marriage. Unless those forms are gone through, the relation of husband and wife is not

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brought about in either case and there can be no marriage tie. Those forms consist in the invocation before the sacred fire and the seven steps (Saptapadi) taken before that fire by the bridegroom and the bride jointly. As said in the Madana Parijata (page 157, Bibliotheca Indica Series), "it should not be doubted whether the relation of husband and wife is produced in the *Asura* and other forms of marriage by reason of the absence of the *saptapadi* or seven steps ceremony therein. Even in those forms of marriage the observance of that ceremony is prescribed by way of command after acceptance." Those steps taken, the marriage tie becomes indissoluble. (The Hindu Law of Marriage and Stridhan by Sir Gooroodass Banerjee, 2nd Edition, page 89; Madhavacharya's Parashara Samhita, Bombay Oriental Series, Vol. I, part II, pages 88 and 89).

But what distinguishes the one form from the other is that, in a *Brahma* marriage it is a gift of the girl pure and simple; in the *Asura*, it is the sale of the bride for pecuniary consideration. If the sale exists, its effects cannot be undone by the form of a gift being gone through.

It is contended by Mr. Gokuldas for the appellant that the true test of the *Asura* form of marriage is the taking of the bride-price by none but the father of the girl, or, in default of him, by any of her paternal kindred giving her in marriage. In support of this argument the following Smriti of Manu[1] is relied upon :—

"When (the bridegroom) receives a maiden, after having given as much wealth as he can afford, to the kinsmen and to the bride herself, according to his own will, that is called the *Asura* rite."

The original in this text for "kinsmen" is *jnati*, which, Mr. Gokuldas argues, means "paternal kindred." That no doubt is the meaning, according to certain scholiasts[2]. So also in his gloss on the third verse of Yajnyavalkya in the Chapter on "Impurity," where the word *jnati* occurs, Vijananeshwara in

(1) Sacred Books of the East, Vol. XXV, page 81, Section 31.

(2) See the St. Petersburgh Sanskrit Dictionary under the word *Jnati*.

the Mitakshara[1] explains the word as meaning *samana gotraja sapindas* and *samanodakas*.

But the question is whether this text of Manu uses the word *jnati* as exhaustive, confining the right to receive the bride-price to paternal relations in the absence of the father, or as illustrative, extending it to all who have the right to give the girl in marriage.

The answer to that question must depend upon whether the duty of giving a girl in marriage devolves in the first instance upon her father, and in default of him, on any of her paternal relations only, or extends to all relations, paternal or maternal.

A text of Yajnyavalkya[2] mentions the paternal relations as being charged with the duty. But Narada[3] and Vishnu[4] include the maternal relations also. The former specifically mentions the girl's maternal uncle. Nilakantha in his Sanskara Mayukha quotes as authorities both the text of Yajnyavalkya and of Narada. Madhavacharya in his Commentary on Parashara Samhita quotes as authority the text of Narada.

No doubt Vijnaneshwara in the Mitakshara quotes only Yajnyavalkya's text and makes no reference either to Narada's or Vishnu's. But no importance attaches to that circumstance. The Mitakshara purports to be a commentary on Yajanyavalkya, and Vijnaneshwara[5] himself enunciates the principle that where all Smritis are of equal importance, and where there is conflict between two or more Smriti writers, we are free to choose any we like. Nilakantha in the Vyvahara Mayukha cites Yajnyavalkya's text that where there is a conflict between two or more Smritis that one should be accepted which is conformable to equity[6].

The rule of the Hindu Shastras that a girl must be given in marriage as far as possible and that she cannot give herself

(1) Moghe's Third Edition, page 274.

(2) Mandlik's Hindu Law, page 169, Sections 63 and 64.

(3) Sacred Books of the East, Vol. XXXIII, part I, page 169.

(4) Sacred Books of the East, Vol. VII, page 109.

(5) विरोधे तु विकल्प: Moghe's Edition (3rd) of the Mitakshara, page 3.

(6) Mandlik's Hindu Law, page 5, lines 17 to 20.

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unless there is no relation to give her is founded upon the theory that women have no independence. Her father, or, in his absence, any relation who, as guardian standing in the father's place, has supported and protected her during her virginhood, is charged with the duty. This is pointed out in the Mitakshara[1], where it is said:—"The gift is enjoined only in the case of a virgin who has been protected by her father and others." The word "others" being construed *ejusdem generis* with the word "father"—a construction of which several illustrations are to be found in the writings of the Nibandhakaras or Commentators on Hindu Law—the passage means that, where there is no father, the duty of giving a girl in a marriage devolves on a relation of hers who stands in his place as her legal guardian and has as such protected her.

If, then, the Smritis of Narada and of Vishnu are as authoritative as the Smriti of Yajnyavalkya, the maternal relations of a girl are among the kindred whose duty it is to give her in marriage. And the text of Manu, on which Mr. Gokuldas strongly relies, must be construed as being descriptive, not enumerative, according to the canon of interpretation in Hindu Law, known as *nyaya samyatwa* or *samana nyayatwa*, that a rule, which in terms applies to one individual, who is a member of a class composed of many persons, all possessing the same property or attribute, must be held to apply not only to that individual but also to all the other members of the same class in matters relating to that property, because all of them stand in respect of it on the same footing[2]".

An instance of the application of this rule of interpretation is to be found in the portions of the Mitakshara and of the Vyavahara Mayukha which deal with partition. There Vijnaneshwara and Nilakantha respectively refer to a text of Manu, which says that if at a partition in a joint familly, consisting of two or more brothers, the elder or eldest deceive the younger

(1) Moghe's Third Edition, page 265. पित्रादिरक्षितायाः कन्यायाः एव दानापेदेशात्.

(2) बहूनामेकधर्मीणामेकस्यापि यदुच्यते । सर्वेषामेव तत्कार्यमेकरूपाहि ते स्मृता :

The Mitakshara, Moghe's 3rd Edition, page 397. The rule is quoted there as Ushanas's. In the Vira Mitrodaya it is quoted as Baudhyayana's, page 25: Shastri Gholap C. Farkar's Edition.

brother or brothers by concealing any part of the joint wealth, he (the elder or eldest) shall be punished by the king and deprived of his share. Vijnaneshwara explains that though Manu mentions only the elder brother, the text applies to the younger equally, if the latter be guilty of similar fraud. Nilakantha too says the same.

If, then, the maternal relations of a girl are like the paternal relations in the category of those charged with the duty of giving her in marriage, what Manu says in the text relied upon by Mr. Gokuldas about the paternal relations must apply to the maternal relations also on the rule of interpretation just mentioned. The receipt of bride-price is no doubt condemned by Manu as a sin: but he allows as lawful a marriage in which such receipt enters as consideration for the sale of the girl; and it is difficult to understand why the marriage should be *Asura*, if the girl happens to be given by one of her paternal relations by receiving a gratuity, whereas it should not be that if the party giving her and receiving the gratuity happens to be one of her maternal relations.

In the present case Chunilal (defendant No. 2), who gave Mani in marriage, was her maternal uncle; and a maternal uncle is mentioned among the guardians competent to give a girl in marriage. Besides, by reason of that relationship he was at the time of the marriage the legal guardian of her person duly appointed by a Court of Law. He supplied to her the place of her father. It is true that his power to give her in marriage was subject to the condition of the Court's consent; and he infringed it. But that circumstance cannot affect the question as to the form of marriage, if he was, according to law, her relation and guardian, and as such was competent to receive the bride-price and give the marriage the *Asura* form.

We are not to be understood as deciding that the conclusion above stated would apply to the marriage of a girl who has been sold in marriage by a person who was neither her paternal nor maternal relation. According to the Shastras, the giving of a girl in marriage is a pious act, and even a person who is in no way related to her may so give her, if she has no relations, or, if there being relations, they are unwilling to discharge that duty.

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In Madan Ratna Skandha quoted in the Nirnaya Sindhu (page 245, Jnana Sagar Edition) it is said that "it is proper (for a man) to give in marriage according to the (prescribed) religious rites the unmarried daughter of another person, even if she is not of the same *gotra* as himself, after making her his own (daughter) and by (presenting) her (with ornaments) of gold." Such a case, when it arises, will have to be determined on its own merits.

Lastly, it remains to notice Mr. Gokuldas's argument that Mani's marriage should not be held to have been in the *Asura* form, because there is no evidence and no finding that Mani received any money for herself as bride from the bride-groom before marriage, whereas the text of Manu, which defines that form, requires that payment of money as consideration for the gift of the girl in marriage shall be not only to her relations (*jnati*) giving her but it must be also to the girl. But, as Nilakantha points out in his Sanskara Mayukha[1] on the authority of another text of Manu, the taint of the *Asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her; and it is the taint which determines the form.

On these grounds the decree of the Court below must be confirmed with costs.

Decree confirmed.

R. R.

(1) एवंचान्यार्थं धनग्रहणे कन्यार्थेतुन दोषः [Samskara Mayukha: Amarapurkar's Edition, page 45.]

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

PURSHOTTAM HARGOVAN PAREKH (ORIGINAL PLAINTIFF, APPLICANT), APPELLANT, *v.* HARBHAMJI AMARSANGJI THAKAR AND OTHERS (ORIGINAL DEFENDANTS, OPPONENTS), RESPONDENTS.*

1900. *April* 14.

Gujrat Talukdars' Act (Bombay Act VI of 1888, as amended by Act II of 1905), section 31†—Decree—Execution against Talukdar's Estate—Consent of the Talukdari Settlement Officer—Civil Procedure Code (Act XIV of 1882), sections 320, 323.

In execution of a money decree against a talukdar several villages belonging to him were attached: and the darkhast was sent to the Talukdari Settlement Officer (who combined in himself the functions of Collector and Talukdari Settlement Officer for the purpose of execution of decrees against or in respect of talukdari lands) to be dealt with under sections 320—325 of the Civil Procedure Code, 1882. That Officer acting under the sections framed a scheme of management and placed the decree-holder in possession of one of the villages for a given number of years. All this was done after the death of the original judgment-debtor and after the amendment of section 31 of the Gujrat Talukdars' Act, 1888, was made in 1905, but in ignorance of the amendment. The Talukdari Settlement Officer then took up the position that what he had

* First Appeal No. 97 of 1908.

† Gujarat Talukdars' Act (Bombay Act VI of 1888), section 31 runs as follows :— The section originally stood thus :—

"No incumbrance on a talukdar's estate, or on any portion thereof, made by the talukdar after this Act comes into force, shall be valid as to any time beyond such talukdár's natural life, unless such incumbrance is made with the previous written consent of the Talukdari Settlement Officer, or of some other officer appointed by the Governor in Council in this behalf."

To this were added the following words by the Gujrat Talukdars' Amendment Act, 1905 (Bombay Act II of 1905) :—

"And after the death of a talukdar no proceeding for the attachment, sale or delivery of, or any other process affecting the possession or ownership of, a talukdar's estate, or any portion thereof, in execution of any decree obtained against such talukdar or his legal representative, except a decree obtained in respect of an incumbrance made with such consent as aforesaid, or made before this Act comes into force, shall be instituted or continued except with the like consent."

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done was done by him under the Civil Procedure Code, 1882; and that as he had not given his written consent to the arrangement as provided by the amended section 31, the darkhast preferred by the decree-holder should be disposed of.

Per CHANDAVARKAR, *J.*—If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or, being aware of it, he thought he was consenting in virtue of another office which he held. His ignorance of the law giving him the power cannot make the consent not a consent and is no legal ground or excuse for withdrawing it after he has once given it.

Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium.* In such cases, "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can be rebutted by proof that certain forms required by law were not complied with.

Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred.

Section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888) requires that there must be (1) consent, (2) it must be previous, and (3) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite.

APPEAL from the decision of Chimanlal Lallubhai, First Class Subordinate Judge at Ahmedabad.

Proceedings in execution.

The plaintiff obtained a money decree for Rs. 5,007 against the original defendants (represented by the heirs the respondents) on the 26th September 1891.

In execution of this decree, several villages belonging to the respondents were attached; and the Court sent the darkhast to the Collector to be dealt with under sections 320—325 of the Civil Procedure Code (Act XIV of 1882). The Collector transferred this decree to the Talukdari Settlement Officer, who was competent to deal with it for the purpose of execution of decrees against or in respect of talukdari lands.

The Talukdari Settlement Officer next framed a scheme whereby it was arranged that the plaintiff should be put in possession of one of the attached villages and allowed to enjoy the income of that village for seven years in satisfaction of the decree and that the other villages should be released from attachment. The plaintiff assented to the scheme and the Talukdari Settlement Officer, acting upon it, wrote to the Deputy Manager a letter, informing him of the scheme and asking him to put the plaintiff in possession of the village. The Talukdari Settlement Officer also recorded an order to that effect and sent it to the Court which passed the decree.

In 1905, section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888) was amended. The scheme was made by the Talukdari Settlement Officer and the village was delivered to the plaintiff after the death of the original judgment-debtor and after the section was amended but in ignorance of the amendment.

Subsequently, on the 12th November 1907, the Talukdari Settlement Officer reported to the Collector of Ahmedabad that the plaintiff's darkhast could not be proceeded with under section 31 of Bombay Act VI of 1888 as amended by Bombay Act II of 1905. This was sent by the Collector to the Civil Court.

The Court asked the Talukdari Settlement Officer, on the plaintiff's application, to show cause why the actions taken by him from time to time should not be construed into his consent as required by the amended section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888).

The Talukdari Settlement Officer replied as follows:—

"The consent contemplated in section 31 of the Amended Talukdari Act was never given nor was it intended to be given for the continuance of the execution proceedings as stated by the plaintiff, and the preparation of a scheme under section 323 of the Civil Procedure Code does not imply the grant of such consent which can only be given in writing. The steps shown by the plaintiff in his petition as taken by this office in connection with the execution proceedings are under the Civil Procedure Code. There has been no action taken by this office which would show that such a previous written consent as contemplated by section 31 of the amended Talukdari Act was ever given or intended to be given."

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The Court agreed with the contentions of the Talukdari Settlement Officer and ordered the darkhast to be disposed of on the following grounds :—

It is urged that the Talukdari Settlement Officer should be held to have given consent for the continuance of the execution proceedings as required by section 31 of the amended Talukdari Act. Under section 320 of the Civil Procedure Code, the execution of the decrees is transferred to the Collector and not to the Talukdari Settlement Officer, and the Collector executes them or gets them executed, through his subordinates, and so the Talukdari Settlement Officer is not wrong in saying that he adopted the steps above said under the Civil Procedure Code in execution of the decree and not under the amended Talukdari Act. It is clear from section 31 of the Act that the consent should be in writing and should not be presumed from the conduct of the Talukdari Settlement Officer, or from certain steps adopted by him in executing the decree. No consideration is required for such consent, and the Talukdari Settlement Officer cannot be said to have given consent merely because the applicant withdrew two darkhasts under the kabulayat made by him to the Talukdari Settlement Officer. The Talukdari Settlement Officer states that the consent contemplated in section 31 of the Amended Talukdari Act was never given nor was it intended to be given for continuance of the execution proceedings, and there is nothing to show that the Talukdari Settlement Officer gave express consent for continuance of the execution proceeding.

The plaintiff appealed to the High Court.

T. R. Desai for the appellant contended that the Talukdari Settlement Officer had given his consent as required by the amended section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888). The framing of the scheme, the putting of the plaintiff into possession of one of the villages attached, and the communication thereof to the Civil Court are acts which clearly show that the consent of the Talukdari Settlement Officer was given to the arrangement in every sense of the term. The consent might indeed have been given in ignorance of the amendment in section 31; but ignorance of law is no excuse.

L. A. Shah for the respondent No. 1.—There is no consent here of the Talukdari Settlement Officer as required by section 31 of the Gujrat Talukdars' Act, 1888. The consent should be express, made previously and in writing. All that the Talukdari Settlement Officer has done has been done by him in his capacity as Collector under sections 320—324 of the Civil Procedure Code, 1882. The scheme framed was under section 323 of the Code.

The provisions of section 31 of the Gujrat Talukdars' Act, 1888, should be strictly construed in favour of the judgment-debtor. When an officer holds two capacities as in this case, and he has to do an act to validate a proceeding, that act, before it can be construed to have a certain effect, must be shown to have been done with intent to procure that effect.

M. N. Mehta, for respondents Nos. 2—5.

T. R. Desai in reply.

CHANDAVARKAR, J.:—The appellant, having obtained a money decree against a Talukdar, who is now deceased and is represented by the respondents, presented a *darkhast* for its execution. Several villages, belonging to the Talukdar, were attached and the Court sent the *darkhast* to the Collector to be dealt with under sections 320 to 325 of the Code of Civil Procedure of 1882, then in force. The Collector in his turn transferred the *darkhast* to the Talukdari Settlement Officer, the reason for that being that the latter combined in himself, according to a rule having the force of law, the functions of Collector and Talukdari Settlement Officer for the purpose of execution of decrees against or in respect of *talukdari* lands. That Officer, acting under the sections in question, framed a scheme, whereby it was arranged that the appellant should be put in possession of one of the attached villages and allowed to enjoy the income of that village for seven years in satisfaction of the decree and that the other villages should be released from attachment. The appellant assented to the scheme, and the Talukdari Settlement Officer, acting upon it, wrote to the Deputy Manager a letter (Exhibit 54), informing him of the scheme and asking him to put the appellant in possession of the village. At the same time the Talukdari Settlement Officer recorded an order and sent it to the Court which had passed the money decree. That order (see Exhibit 22) is as follows:—

"The Kabulayat, given by the plaintiff to accept in Pulachut the income of Karsanpura for 7 years in satisfaction of his Darkhast No. 614—1899 and 552—1899 is put in the case; order is given to the Deputy Manager to carry it out accordingly. This darkhast is to be entered in the list of Japti Vahivat (management of attached estates) under section 323, Civil Procedure Code, and order is given to send its account every year and therefore this darkhast is taken out of the list of cases under inquiry and entered in the list of attached estates."

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The scheme was made, the order was passed and delivery of possession of the village was given to the appellant after the judgment-debtor had died and after the amendment of section 31 of the Talukdars' Act had come into force.

[His Lordship then read section 31 of the Talukdars' Act and continued :—]

It appears that the Talukdari Settlement Officer was not aware of the latter portion of section 31 when he settled the scheme, passed his order, and put the appellant in possession of the village. Accordingly, the Court was requested to dispose of the *darkhast* by holding that the appellant could not retain possession of the village under the scheme.

The lower Court has allowed the Tálukdari Settlement Officer's objection to the *darkhast* on the ground that there was no previous consent in writing of his such as is required by the last part of section 31 of the Tálukdári Act.

The Talukdari Settlement Officer's contention in the Court below was that he had never given any such consent as the section required, because all he had said and done had been not under that section but under section 323 of the Code of Civil Procedure.

I am unable to accept this contention. All that section 31 required was his previous consent in writing. That there was such consent is clear from Exhibit 5 and the Officer's order quoted above. It may be that the Talukdari Settlement Officer was not aware of the amendment of section 31 and so had not the remotest consciousness that he was acting in conformity with it when he settled the scheme and allowed the appellant to be put in possession of the village. But if a person, holding a certain office, is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or, being aware of it, he thought he was consenting in virtue of another office which he held. His igno-

rance of the law giving him the power cannot make the consent not a consent and is no legal ground or excuse for withdrawing it after he has once given it. As was said by Lord Ellenborough, C. J., in *Bilbie* v. *Lumley*[1], "Every man must be taken to be cognisant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case." As for the plea that the consent was given by the Talukdari Settlement Officer, not under section 31 of the Talukdars' Act but under section 323 of the Code, it is answered by the rule of law that where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*. In such cases, "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can indeed be rebutted by proof that certain forms required by law were not complied with. Here no form is prescribed by law. All that is urged is that the Talukdari Settlement Officer did not know of the law embodied in section 31 of the Talukdars' Act when he gave his consent to the scheme. We are, therefore, brought back to the plea of ignorance of law, which, as I have said, is no excuse.

It is to be remarked that the powers under section 323 of the Code of Civil Procedure conferred on the Collector and those conferred on the Tálukdári Settlement Officer by section 31 of the Tálukdári Act are both enabling or discretionary and are not necessarily of a mutually contradictory character. Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both sections, if it can be so referred. It is not that in respect of one office the action was without, and in respect of the other it was with jurisdiction.

If he had the discretionary jurisdiction as to the action in both capacities, the law will refer it to both of them and then the question is reduced simply to this—had he given previous consent

(1) (1802) 2 East 469 at p. 472.

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in writing as required by section 31 of the Tálukdárs' Act? That section prescribes no particular form for the consent. All it requires is that there must be (1) consent, (2) that it must be previous, and (3) that it must be in writing. It is not disputed before us that these three conditions are satisfied by Exhibit 54 and Exhibit 22. As to the first of these conditions, all we have to see is that the person who gave the consent occupied at the time the office of Tálukdári Settlement Officer and that he acted deliberately in the matter of the scheme and gave his sanction to it freely, because "consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side," that is, it must not be due to fraud, or undue influence. (Story's Equity Jurisprudence, 2nd edn., section 222). The Tálukdári Settlement Officer is shown by the evidence to have given his sanction to the scheme after fully considering the circumstances of the case. The argument that such consideration was bestowed by him on the scheme in his capacity as Collector ignores the fact that though he held two offices it was one mind which considered the scheme before consenting to it. And that consent was embodied in writing in Exhibit 54, the letter he wrote to his Deputy, asking him to give delivery of possession to the decree-holder, and in the order, forming part of Exhibit 22, sent to the Court with the *darkhast*. Both these were put in writing before delivery of possession to the decree-holder.

On these grounds, in my opinion, the decree appealed from must be reversed and the *darkhast* should be allowed to continue. The appellant must have the costs both in this Court and the Court below from the respondent No. 1 who is to bear his own.

HEATON, J.—By Bombay Act II of 1905, section 31 of Bombay Act VI of 1888 was so amended that thereafter "no proceeding for the attachment, sale or delivery of, or any other process affecting the possession or ownership of, a Tálukdári estate, or any portion thereof in execution of a decree" could be instituted or continued without the previous written consent of the Tálukdári Settlement Officer.

The decree-holder in these proceedings had several unexecuted decrees against a Tálukdár of which applications for execution were pending. In the proceedings on one of these applications

an order was made for selling the estate of the Tálukdár or a portion thereof and the proceedings were sent to the Collector under section 320, Civil Procedure Code. It fell to the Tálukdári Settlement Officer, who in certain cases is the Collector for execution purposes, to deal with the matter. He entered into an arrangement with the decree-holder by which a scheme was made as permitted by section 323, Civil Procedure Code, under which the decree-holder was to have possession of one Tálukdári village for seven years in discharge of his decrees. Meantime two out of four applications for execution were to be withdrawn, and the remaining two, kept pending. The negotiations had begun before the amendment of section 31 came into force; but the scheme was finally arranged, accepted and given effect to after the amendment. The question is whether the execution proceedings were continued with the previous written consent of the Tálukdári Settlement Officer as required by section 31 of the Act. I think they were. The Tálukdári Settlement Officer undoubtedly did consent to the continuance; that is plain from the letters he sent to the Court. It is equally plain that the consent was in writing and that it was previous to the delivery of possession to the decree-holder. The only argument of any importance against holding the previous written consent to be of the kind contemplated by section 31, is that it was not given for the purpose of section 31 and was given in ignorance of or without regard to the provisions of that section and merely in pursuance of execution proceedings which the Tálukdári Settlement Officer was bound to conduct. I do not think that after the amendment of section 31 he was bound to conduct them. It was open to him to refuse to consent to their continuance and to refer them back to the Court. I also do not think the evidence establishes the contention of ignorance or that the consent was not given for the purpose of section 31. The Tálukdári Settlement Officer of the time was not examined as a witness and there is no direct evidence on the matter. We are left to conjecture and I do not think the circumstances justify the conjecture urged by the respondent. Therefore I concur in the order proposed.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909. *April* 14.

BHIMACHARYA BIN VENKAPPACHARYA (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMACHARYA BIN BHIMACHARYA (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Mitakshara—Stridhan—Succession—Competition between husband and step-son.

Under the Mitakshara school of Hindu law, when a married Hindu woman dies, leaving no issue, her husband is entitled to succeed to her *stridhan* in preference to her husband's son by another wife.

SECOND appeal from the decision of Vishvanath V. Wagh, First Class Subordinate Judge with appellate powers at Bijápur, confirming the decree passed by D. A. Idgunji, Subordinate Judge at Bágalkot.

The property in dispute belonged originally to one Kristacharya, who died on the 14th December 1902 leaving him surviving a daughter Bagawa by name. Bagawa was married to Ramacharya (defendant No. 1). Ramacharya had a son by his first wife: he was Bhimacharya (the plaintiff).

Bagawa died on the 25th December 1902. At her death, the plaintiff (her step-son) claimed that he was entitled to succeed to the *Stridhan* of Bagawa which he inherited from Kristacharya. His claim was resisted by Ramacharya, father of plaintiff and husband of Bagawa.

The Subordinate Judge decided the suit in the defendants' favour on the following grounds:—

Assuming that the property is Bagawa's Stridhan, the question is whether, on her death without issue her next heir is her husband or the son of her husband by another wife.

The material tests of the Mitakshara are those given in chapter 2, section XI, placita 8, 9, 11.

"9. If a woman die without issue, that is leaving no progeny; in other words having no daughter nor daughter's daughter nor daughter's son, nor son, nor son's son, the woman's property as above described shall be taken by her kinsmen, namely, her husband and the rest as will be (forthwith) explained."

* Second Appeal No. 569 of 1908.

The rights of the progeny are shown in Manu IX, 192 "all uterine brothers should divide the maternal estate equally and so should sisters by the same mothers." The commentary expressly states :—"The whole blood is mentioned to exclude the half-blood. But, though springing from a different mother, the daughter of a rival wife, being superior by class shall take the property of a childless woman who belongs to an inferior tribe. On a failure of the step-daughter her issue shall succeed."

Then comes a citation of Manu, chapter IX, 198. "Step-children are not recognized by the Mitakshara as entitled, except in the single case, which has now become impossible, where the woman who has left the property was the wife of an inferior class" (*cf.* Mayne, Para, section 670, 6th edition).

The step-son may come after the husband by reason of placitum 11 (Mit. chapter II, section XI).

And of a woman dying without issue as before stated and who had become a wife by any of the four modes denominated Brahma, etc.—the. (whole) property as before described, belongs in the first place to her husband. On failure of him it goes to his nearest kinsman (Sapindas) alive by funeral oblations.

It is thus clear that according to the Mitakshara in the case of a woman dying without issue as before stated when the marriage is in the Brahma form as in the present case, her property belongs to her husband "in the first place."

The Smriti Chandrika expressly lays down :—"He (step-son) takes the property on failure of offspring, husband, and the like." (Chapter IX, section 3, page 38) quoted by West and Bühler, page 522 (3rd edition).

These authorities would clearly show that the husband of Bagawa is the next heir to Bagawa's Stridhan and not the plaintiff who is the Bagawa's step-son.

The plaintiff's pleaders rely on Manu, chapter IX, Shlokas 182, 183. The latter lays down that the son of a man by one of his wives is as a son to all his wives.

If this is so, it is argued that the plaintiff is the son of Bagawa the next however refers in express terms to progeny of the full blood as shown above. The next argument is that after the full blood at any rate, the step-son will come in by reason of Shloka 183. The Mitakshara provides that in default of progeny, by which progeny of the full blood is indicated, the husband succeeds "in the first place." It would be clear that Shloka 183 cannot be allowed to override this express provision. Both these Shlokas were before their Lordships of the Privy Council, in their bearing on the aspect of inheritance. They observe :—"We must suppose that all take the spiritual benefits of male issue ; but the law is clear that for the purposes of inheritance" (*cf. Annapurni Nachiar* v. *Forbes*(1)).

There an adopted son died leaving property and it was held that the mother who took part in the adoption succeeded in preference to the other mother.

(1) (1899) 23 Mad. 1 at p. 9.

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The title of a step-mother to rank as mother in matters of inheritance cannot be validly based on Shloka 183, as was laid down. The title of the step-son to come in before the husband's rights based on express provision, can hardly be substantiated by the same Shloka.

"If the son born in lawful wedlock" means or includes a son of a rival wife (as is said in the Dayabhaga) he would take only after the husband and (if the order of succession be based on propinquity) concurrently with the rival wife (see West and Bühler's Digest, page 518)" (cf. *Bai Kesserbai* v. *Hunsraj Morarji* (1)).

Even assuming that the property is Bagawa's Stridhan I find that the plaintiff is not the next heir as Bagawa has left her husband surviving her. He does not come on the record even as the minor plaintiff's next friend and is probably unwilling to prejudice his own rights, by his appearance in a suit..... urged on behalf of his son.

On appeal, this decree was confirmed by the lower appellate Court.

The plaintiff appealed to the High Court.

K. H. Kelkar for the appellant (plaintiff):—Under Hindu law admittedly a son is entitled to succeed to the *stridhan* of a woman in preference to her husband. We contend that a step-son also is entitled to the same preference. If the author of the Mitakshara had meant to give the husband a preference over the step-son, he would have expressly said so.

And Manu (IX, 183) has it that where one out of several co-wives gives birth to a son, all of them by that son become mothers of that son. This text shows that 'son' includes 'step-son'.

In the Mitakshara, there is a specific text which shows that if a woman dies without issue then the daughter (or failing her, her issue) born of a co-wife of a superior class takes her *stridhan* (Mitakshara, p. 211, Moghe's edition).

Mitra Misra expressly mentions step-son and places him above the husband in the line of succession. In discussing the text of Brihaspati, *viz.*, मातुः स्वसा मातुलानी &c. (*Mâtuh Swasa Mâtulâni, &c.*) he says that औरस (*aurasa*) that is, issue of the body includes a step-son. The text in question lays down the line of succession to the stridhan of certain females in case of the

(1) (1906) 30 Bom. 431 at p. 446.

failure of the heirs mentioned therein. Mitra Misra is of opinion that the step-son and his issue become heirs because they are the giver of the Pinda (funeral cake) and the liquidators of debts (Viramitrodaya, Golapchandra Sarkar's edition, translation, p. 243, text p. 98).

Smriti Chandrika (ch. ix, s. 3, Iyer's translation, p. 135) is the only text against our contention. Other authors are silent on the point.

V. G. Ajinkya for the respondents:—In discussing the succession to the *stridhan* of a married female, Vijnaneshwara advisedly uses the word सहोदर (*Sahodara*) (uterine), and then adds सोदरग्रहणं भिन्नोदर निवृत्त्यर्थम्. (*Saudaragrahanam bhinnodara nivratyartham*) (Mitakshara, verse 145, pp. 210, 211, Moghe's edition). This shows clearly that step-son is expressly excluded.

As to Mitra Misra, it will be seen that he begins by saying "But when there is a failure of the abovementioned heirs the childless woman's property, Vrihaspati ordains 'the mother's sister, &c.'". Thus, when the above-mentioned heirs, that is to say, when the heirs which include the husband and which are mentioned in the foregoing part are exhausted, then only what he says about the text मातुः स्वसा &c. (*Matuh swasa, &c.*) is to be considered. This text, again, has been discarded by the Privy Council as unintelligible in *Bai Kesserbai* v. *Hunsraj Morarji* (1).

And, Smriti Chandrika (ch. 9, s. 3) specifically assigns preference to the husband.

CHANDAVARKAR, J.—The question of Hindu Law in this Second Appeal is, when a married Hindu woman dies, leaving no issue, and the competition for heirship to her *stridhan* is between her husband and a son by another wife of the latter, who is entitled to the property—the husband or the step-son of the woman?

The case is governed by the Mitakshara law.

Both the Courts below have decided the question in favour of the husband; and the step-son of the deceased woman has preferred this Second Appeal.

(1) (1906) 30 Bom. 431 at page 451.

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Yajnyavalkya's text regarding succession to the property of a woman, who dies leaving no issue, says:—"Her kinsmen take it, if she die without issue." [The Mit. Chap. II, Section XI, pl 8, page 460, Stokes's Hindu Law Books].

Vijnaneshwara's gloss on the text is as follows:—

"If a woman die 'without issue' that is, leaving no progeny; in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son; the woman's property, as above described, shall be taken by her kinsmen; namely, her husband and the rest as will be (forthwith) explained:" [Do. pl. 9, page 460].

Further on, that is, in his gloss on the next text of Yajnyavalkya, Vijnaneshwara says, "in all forms of marriage, if the woman 'leave progeny,' that is, if she have issue, her property devolves on her daughters." [Pl. 12 Do. page 461].

The original for "have issue" is *prasuta*, i.e., a woman who has children born.

"In default of daughters, or their daughters, or their sons, the sons, if any, of the woman deceased, take her *stridhan*" says Vijnaneshwara on the authority of the text, "the (male) issue succeeds in their default" [pl. 19, page 462].

He further supports the right of the male issue by a text of Manu which runs as follows:—

"When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate." [pl. 19].

He explains this text to mean, not that the uterine brothers and sisters that is, the daughters and sons born of the woman, take the estate as joint heirs, but that the daughters inherit first, and, in default of them, the sons.

The original for "mother" in Manu's text is *janani*, which means, the woman who has given birth to children and left them surviving her. That word and the word "uterine" emphasise the rule that on her death it is her own daughters, and in default of them, her own sons who are her heirs. Hence Vijnaneshwara adds the explanation that step-childern are excluded from this category of heirs. [pl. 19, page 462].

It is urged for the appellant that this exclusion means no more than that step-sons cannot inherit so long as the woman has left sons of her own to inherit her property; but that there is nothing in either Manu's text or Vijnaneshwara's gloss to prevent the step-sons coming in as heirs before her husband as her "sons" in the secondary sense of the word.

But the right of the step-son so to come in, after he has once been expressly excluded from the primary sense of the word "sons" by Manu's text and Vijnaneshwara's explanation, must be founded on some authority discoverable in the Mitakshara. It is impossible to argue that Vijnaneshwara uses the word "sons" in his gloss in placitum 19 or the word "male issue" as including step-sons. Had he intended to include them, he would not have cited Manu's text in support of his meaning and added his gloss that it excludes step-children.

The argument for the appellant just stated comes in effect to this that Vijnaneshwara intends to use the word "sons" in its primary sense, that is, in the sense of sons born of the woman, where such sons are living at her death; but that he uses the same word in its secondary sense, meaning sons of a rival wife, if she has left no sons of her own. But we cannot ascribe to Vijnaneshwara this double interpretation of the word without charging him with the violation of a well known rule of *mimansa* or construction that "in the same passage a word occurring once cannot be taken in its primary and in its secondary sense." (1). Such construction of one and the same word occurring in a text or a rule, involving two interpretations at the same time, is condemned by the commentators on Hindu law as "illogical," as may be seen from the remarks of Nilakantha in the Vyavahara Mayukha in the chapter on "Determination of Heritage." (2).

No doubt "the more comprehensive interpretation may be adopted where it is supported by authority." (3).

The rule is: "सकृदुच्चरितः शब्दः सकृदेवार्थं गमयति". See Bhattacharya's Hindu Law, 2nd Edn., page 64.

Mandlik's Hindu Law, page 36, lines 11 to 13.

(3) Bhattacharya's Hindu Law, 2nd Edn., page 65, citing Dayabhaga XI, v. 2.

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But for our present purposes the authority must be found either in the Mitakshara itself or, where it is silent, in the Vyavahara Mayukha. None can be found in either.

On the other hand, both what Vijnaneshwara has omitted to say and what he has gone on to point out after explaining Manu's text as excluding step-sons from the category of "sons", show plainly that he did not intend step-sons to come in as heirs of the woman before her husband.

After having given his explanation of Manu's text, he studiously omits to say that in default of sons born of the woman, her step-sons (sons of a rival wife) come in. This omission is significant, because, in dealing with the compact series of heirs in a case of what is called "obstructed succession", wherever he is in favour of the admission of the half-blood immediately after the full-blood into the class of enumerated heirs, he says so and does not leave the matter to mere inference or conjecture. [see the Mit., Ch. II, Sec. IV. plac. 6: Stokes's Hindu Law Books, page. 445].

The omission becomes all the more significant when we have regard to what Vijnaneshwara goes on to say after having given his explanation of Manu's text. On the authority of another text of Manu he declares the right of a step-daughter of the woman to inherit before the latter's husband, provided that the step-daughter is of a caste superior to that of the woman. [The Mit. Ch. II. Sec. XI, plac. 22: Stokes's Hindu Law Books, page 463.]

The express inclusion of this particular class of step-children in the class of heirs taking before the husband implies the exclusion from that class of all other step-children.

It is true that this rule as to the right of a step-daughter of a superior caste is supposed by some commentators to apply also where the step-daughter and the woman happen to be of the same, that is, "equal" caste. But Vijnaneshwara's remarks and the illustrations he gives are clearly opposed to the supposition; and Nilakantha in the Vyavahara Mayukha plainly says that the authority for the supposition is "questionable". [see Mandlik's Hindu Law: Vyav. Mayu. page 96, lines 25 and 26].

It follows then from all these considerations that, under the Mitakshara and the Mayukha law, where a married woman dies, leaving her husband and a son by a rival wife, the latter is entitled to inherit her property only after and in default of the former. This interpretation of the Mitakshara is confirmed by Kamalakara, the author of the Nirnaya Sindhu and the Vivada Tandava, quoted at page 580 of Bhattacharya's Hindu Law, 2nd Edition. Kamalakara says :—

"In default of the husband, the daughter, sons, and daughter's sons of the rival wife; and, in their default, the mother-in-law, the father-in-law, the husband's brother, his sons, and other next of kin of the husband (succeed), according to the text: 'The wife, and the daughters also, &c.' This is the opinion of Vijnaneshwara and Apararka."

But the learned Pleader for the appellant relies in support of his argument on certain remarks of Mitra Misra in the Viramitrodaya, which occur on page 243, plac. 14, of Mr. Golapchandra Sarkar's Edition of that work.

The remarks in question, it will be noticed, refer at the very outset to certain heirs "to a childless woman's property" enumerated in a text of Brihaspati, and Mitra Misra begins by pointing out that those heirs come in "when there is a failure of the above mentioned heirs", that is, the heirs mentioned in the preceding placita. Among these latter is the woman's husband, as placitum 13 shows.

No doubt in his gloss on Brihaspati's text, Mitra Misra says that by the term "son" used in that text is "intended the son of a co-wife" and he cites the following text of Manu in support of that :—

"If among all the wives of the same person, one be a mother of a son, then all of them become by that son mothers of male issue; this is ordained by Manu."

But it does not follow from this that Mitra Misra intended the son of a co-wife to be heir to the woman's property in preference to her husband. It is true that he says in the placitum in question that in default of the *aurasa* (born) sons of

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the woman, their sons, and grandsons, "the son of a rival wife, his son, and grandson (become heirs in their order); by reason of their being, under the circumstances, the giver of the *pinda*, and the liquidator of debts, and by reason of the text of Manu, cited above." But he cannot have meant by that to bring in the son of a rival wife before the husband. For, he goes on to say, that "on failure of these," that is, the son of a rival wife, his son, and grandson, "the sister's son and the rest alone," that is, the secondary sons specified in Brihaspati's text, take the property "in spite of the *sapindas* such as the father-in-law". Does that mean that if there is no son of a rival wife, or his son, or grandson, the secondary sons enumerated in Brihaspati's text come in as heirs, ignoring the husband of the woman? Mitra Misra could not have meant that, because he begins his citation of Brihaspati's text by saying that the heirs mentioned therein come in after the husband.

Mitra Misra's remarks, therefore, must be understood as merely pointing out in a general way the heirs who fall under the category of the word 'son' in its more comprehensive sense, not as laying down the order of their succession so as to postpone the husband's right of heirship to that of a son of a rival wife. Had he intended to postpone the right in that way, and to bring in a step-son immediately on failure of a son born of the woman, his son, or grandson, he would have said so where he has discussed Manu's text in which the word 'uterine' occurs. He deals with that text much in the same way that Vijnaneshwara has dealt with it.

As to the text of Manu which Mitra Misra has cited in construing the word 'son' occurring in Brihaspati's text, and which is relied upon for the appellant as showing that a son of a co-wife of a woman becomes the latter's son also, it is to be remarked that the object of the text in question is explained by the more important of the commentators on Manu in such a way as to imply that its application is of a limited character, having no necessary reference to questions of inheritance. [See Mandlik's Manava Dharma Shastra: page 208.] For instance, Sarvajna Narayana, explains the text as meaning that the wife who has no son shall not resort to *niyoga*

(levirate), if her co-wife has a son born of her. Culluca Bhatta and Raghavananda explain that the text is intended to prohibit adoption by the wife who has no son born of her. And the context in which this text of Manu finds its place in his *Smriti* supports that view. It is immediately preceded by another text which declares; "If among brothers, sprung from one (father), one have a son, Manu has declared them all to have male offspring through that son." [Sacred Books of the East: Vol. XXV, Ch. IX, 182.] Vijnaneshwara in the Mitakshara quotes this text and explains that it "is intended to forbid the adoption of others if a brother's son can possibly be adopted. It is not intended to declare him son of his uncle". [The Mit. Ch. I. Sec. XI, plac. 36, Stokes's Hindu Law Books, page 424.] If this text has this limited meaning and scope, the other text relating to the son of a co-wife, must have its scope similarly narrowed, having regard to the fact that it occurs immediately after the former. And that is the view which has commended itself to their Lordships of the Privy Council as to the scope of both these texts of Manu. See *Annapurni Nachiar* v. *Forbes*[1] where their Lordships say:—"Reference has been made to the text of Manu (Book IX, Shloka 183), in which he declares that if of several wives one brings forth a male child, all shall by means of that child be mothers of male issue. In the preceding Shloka he declares that if among several brothers of the whole blood one have a son born, they are all made fathers of a male child by means of that son. We must suppose that all take the spiritual benefits of male issue: but the law is clear that for the purposes of inheritance the natural mothers and fathers respectively are preferred."

Certain commentaries such as the Madana Parijata and the Vivadarnava Setu no doubt assert the right of the son of a rival wife of a woman to inherit the *stridhan* of the latter before her husband; but for the reasons we have given in this judgment, their view must be held to find no support from either the Mitakshara or the Vyavahara Mayûkha or the author of the Smriti Chandrika. The last says: "The issue of a rival wife

(1) (1899) L. R. 26 I. A. 246 at p. 253.

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takes the property of the step-mother, where the latter leaves no progeny, husband, or the like". [Smriti Chandrika, Kristnasawmy Iyer's Ed. 2nd, page 135, section 38.]

That the husband of a childless woman is entitled to inherit her *stridhan* before a son by another wife of his seems to us to follow as a necessary corollary to certain decisions of this Court. In *Kesserbai* v. *Valab Raoji*[1] it was held that a step-mother could not inherit her step-son's property under the term "mother" but that she could come in only as a *gotraja sapinda* on the authority of the decisions in *Lakshmibai* v. *Jayram Hari*[2] and *Lallubhai* v. *Mankuvarbai*[3]. If a step-mother cannot come in as "mother" in the line of heirs to her step-son but can only come in as a *gotraja sapinda*, it follows, from the same reasoning, that the step-son cannot come in as "son" but can inherit only as a *gotraja sapinda* of his step-mother.

For these reasons the decree appealed from must be confirmed with costs.

Decree confirmed.

R. R.

(1) (1879) 4 Bom. 188 at p. 208. (2) (1869) 6 Bom. H. C. Rep. 152 (A. C. J.).
(3) (1876) 2 Bom. 388.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

1908.

July 22.

IN RE NAOROJI SORABJI TALATI *

Indian Insolvency Act (11 and 12 Vict. c. 21), secs. 7, 26 and 36—Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai.

The firm of T. and Co. filed their petition in insolvency in Bombay on 29th April 1907 at which time one of the partners M. was at Shanghai. M. subsequently swore his petition at Shanghai on 16th October 1907.

On 16th March 1907 certain creditors of the firm obtained an order directing M. to appear before the Court of Insolvent Debtors at Bombay to be examined under section 36 of the Indian Insolvency Act.

* Nos. 197 and 200 of 1907.

A Rule *nisi* was obtained on behalf of M. calling upon the opposing creditors to show cause why the above order should not be set aside.

These creditors also obtained a Rule *nisi* calling on M. to show cause why he should not deliver up to the Official Assignee goods belonging to the Insolvent firm in his possession at Shanghai.

These two Rules were heard together.

Held, that the property of the insolvent debtors' firm in Shanghai vested in the Official Assignee of the Insolvent Debtor's Court at Bombay, and that Court could order M. to hand over such property to the Official Assignee in Bombay.

Held, further, that the Insolvent Debtor's Court at Bombay can order the examination of a witness at Shanghai, but cannot direct a witness to come to Bombay to be examined, there being no machinery for that purpose.

THE firm of Talati & Co. consisting of four partners on the 29th April 1907 filed their petition in insolvency in the High Court at Bombay. At the time the petition was filed one of the partners Maneckji Pestonji Talati was at Shanghai having gone there in October 1906 to look after the affairs of the firm. Accordingly he did not join in the petition. Subsequently Maneckji Pestonji Talati swore his petition at Shanghai on 16th October 1907, and that petition was presented to Russell, J., in the Insolvency Court at Bombay on 4th December 1907. Russell, J., took time to consider his judgment which he delivered on 11th December 1907 rejecting the petition on the ground that Maneckji Pestonji Talati was not within the jurisdiction of the Court[1].

Among the creditors of the insolvents was the firm of Abhechand Goculdas who had obtained a decree against the insolvents for Rs. 16,951 on the 8th April 1907.

These creditors on the 4th March 1908 applied for and obtained an order directing Maneckji under section 36 of the Indian Insolvency Act to personally appear before the Court on the 17th June 1908 in order that he might be then and there examined touching the estate and effects and dealings of the insolvents and to produce all the books of account, papers and documents in any way relating to the insolvents' dealings and transactions.

On the same day a Rule *nisi* was obtained by the opposing creditors calling upon Maneckji to show cause why he should

(1) (1907) 10 Bom. L. R. 84.

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not forthwith deliver over to the Official Assignee for the benefit of the general body of creditors the goods of the value of fifteen lacs belonging to the insolvents' firm now in his possession or subject to his control or the sale-proceeds thereof.

On the 15th April 1908 a Rule *nisi* was applied for and obtained on behalf of the said Maneckji calling upon the opposing creditors to show cause why the order for examination should not be set aside.

Setalvad in support of the Rule *nisi*.

Under section 4 of the Insolvency Act the Court cannot summon before it a witness who resides at a distance of more than 200 miles. It is untrue that Maneckji is in possession of goods or money amounting to 15 lacs. All the goods that were at Shanghai when the firm failed were in the possession of the banks who had advanced money on their security.

R. Wadia for the opposing creditor.

In *In re Cawasji Ookerji*[1] it was held that the Court had power to summon before it witnesses residing at longer distances than 200 miles.

Setalvad in reply.

In *In re Cawasji Ookerji* the insolvent had filed his schedule in Bombay and had been punished under sections 50 and 57.

RUSSELL, J.:—An important question arises on each of these rules which were argued before me on Wednesday last particularly having regard to the fact that it has been suggested that the proposed New Insolvency Act for Presidency Towns in India shall not be an Imperial Statute.

For if I am right in the conclusions I have arrived at it is highly desirable that the Insolvency Act for Presidency Towns should continue to be an Imperial Statute.

On the 4th March 1908, M. P. Talati was called on to show cause why he should not deliver to the Official Assignee of Bombay goods of the value of fifteen lacs, belonging to the insolvents' firm now in his possession, or the sale-proceeds thereof, under section 26 of the Indian Insolvency Act.

(1) (1888) 13 Bom. 114.

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On the same day the same person was ordered to attend the Court for examination under section 36, and on 15th April 1908 he by his constituted attorney took out a rule calling on the opposing creditor to show cause why that order should not be set aside.

It appears that a firm comprising N. S. Talati, D. S. Talati and Hujarimal Multanchand filed their petition in this Court on the 29th April 1907 and on that day the usual vesting order was made. M. P. Talati was a partner in that firm and left Bombay for Shanghai in October 1906. Since then he has been carrying on the firm's business at Shanghai. M. P. Talati presented a petition to this Court to be declared insolvent, but it was held that this Court had no jurisdiction to entertain it: see *Re Manekji Pestonji Talati*[1].

From the power of attorney put in at the argument before me it appears that M. P. Talati is a British subject and it is stated on the opposing creditor's affidavit and not denied that there is at Shanghai "a British Consulate (*sic*—evidently intended for 'Consular') Court" which has jurisdiction in insolvency and jurisdiction over M. P. Talati. It also appears on the rule and order of the 4th March that they were served on M. P. Talati through "H. B. M.'s Supreme Court for China and Korea at Shanghai."

The first question I propose to discuss is whether this Court can order M. P. Talati to deliver over the goods of the firm to the Official Assignee of Bombay. I deal hereafter with the question whether he has any of such goods in his possession in fact.

The Act for Relief of Insolvent Debtors in India is an Imperial Statute, and it must be borne in mind that "the jurisdiction of such Bombay Court" (and for this purpose an Insolvency Court stands on the same footing) is partly local and partly imperial, "the imperial nature of the jurisdiction consists in this, that the powers of the bankruptcy courts to discharge debtors from their debts extend to all debts wherever contracted; that is to say, the discharge of a debtor by a court exercising bankruptcy jurisdiction in England will discharge a debt contracted by the

(1) (1907) 10 Bom. L. R. 84.

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debtor in one of the colonies or colonial States or in India, and the provisions as to the vesting of property in the officer appointed to collect and distribute it extend all over the Empire, so that, when a man is made bankrupt by a bankruptcy court in England, property which he has in the colonies or colonial States or in India will become distributable by the English Trustee in the bankruptcy, who can enforce his title to it." Vol. II, Laws of England by Lord Halsbury, title: Bankruptcy and Insolvency, p. 6 and cases there referred to.

By section 7 of the Indian Insolvency Act all the property of the insolvent, whether within the limits of the Charter of the East India Company or without vests in the Official Assignee.

Section 26 of the Indian Insolvency Act would appear to be supplemental to section 7, for it would be certainly anamolous for one section to vest all the insolvent's property wherever situate in the Official Assignee and the Act not to contain a section empowering the Official Assignee to get hold of such property.

Now in *In re Ganeshdas Panalal*[1], it was held that the Court for the Relief of Insolvent Debtors sitting in Bombay had jurisdiction to make an order under section 26 of the Indian Insolvency Act against a person residing outside the Bombay Presidency. The order asked for there was against a person residing at Amritsar. It will be observed that the Court expressly confined itself to the question before it, i. e., whether the porperty was situate in British India. But it is generally clear that Mr. Inverarity who argued the case for the successful appellants also put the case on the higher ground that the Insolvent Court would make an order as to the property of the insolvent wherever situate within the *British Dominions*. His argument was:

> Coming to section 26 of the Act it will appear that its wording is very general. It says, "that in case *any* person shall, after any such insolvent shall have petitioned for his discharge...be possessed of or have under his power or control any property whatsoever of such insolvent ... it shall be lawful for the said Court further to order such person to deliver over such property... to the Assignee, etc." The section thus says 'any person,' and not 'a person residing within the limits of the town and island of Bombay.' Where an Act of Parliament is in general terms it applies to all countries in the British Dominion where the Imperial Parliament could legislate. See

(1) (1908) 32 Bom. 198: 10 Bom. L. R. 77.

Callender Sykes & Co. v. *Colonial Secretary of Lagos and Davies*, where it is said (1891, A. C., p. 466).—'If a consideration of the scope and object of statute leads to the conclusion that the legislature intended to affect a colony, and the words used are calculated to have that effect, they should be so construed.' And further at p. 467: 'It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law wherever the Imperial Parliament had power to apply it: and their Lordships hold that there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony.'(1)

The Court of Appeal did not express any disagreement with this argument. From this I take it that in this respect the effect of the Indian Insolvency Act is the same as the Bankruptcy Acts in England, Scotland and Ireland under which it is clear that the moveables of the Bankrupt, whether in England or elsewhere, become vested in the trustee or the representative of the creditors. In Story on the Conflict of Laws, pp. 333 and 443 (1896), I say "moveables" advisably as they are all that I am concerned with in this case. In my opinion therefore the property of the insolvents' firm in Shanghai vested in the Official Assignee of the Insolvent Debtors Court in Bombay.

The question then arises can this Court order M. P. Talati to hand over such property to the Official Assignee in Bombay. In my opinion it can, for section 118 of the English Bankruptcy Act is a reproduction of section 74 of the Bankruptcy Act, 1869, and the Judicial Committee have held that that applies throughout the British Dominions. See *Callender Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*(2).

M. P. Talati is a British subject, he is subject to the Insolvent Jurisdiction of the Consular Court at Shanghai and therefore in my opinion that Court can order him if requested so to do by the Insolvent Court of Bombay to produce all the moveable property, books, papers and documents of the insolvents' firm that may be in his possession.

In England such an order would be of course—see *In re Levy's Trusts*(3)—subject to the law applicable in Shanghai; *Ex parte Rogers*(4).

(1) (1908) 10 Bom. L. R. 77 at p. 79.
(2) [1891] A. C. 460.
(3) (1885) 30 Ch. D. 119 at p. 124.
(4) (1881) 16 Ch. D. 665 at p. 666.

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NAOROJI SORABJI TALATI, *In re.*

Although on the affidavits before me it is not possible for me to hold that he has got in his possession property of the vaule of fifteen lacs of rupees, still from the fact of his having presented his petition in insolvency in this Court, it is impossible to suppose that he has in his possession none of the moveables, account books, etc., of the firm in which he was a partner. I allowed the rule to be amended in this respect.

The opposing creditor must therefore make an application for such a request to be sent to H. B. M.'s Supreme Court at Shanghai the terms of which must be submitted to me.

Now as to the order for the examination of the said M. P. Talati I am of opinion that the order can and should be made. "Every British Court with jurisdiction in bankruptcy or insolvency, is bound to act in aid of and be auxiliary to each other in bankruptcy matters; and an order of the Court seeking aid, with a request to the Court whose aid is sought, will be sufficient authority to the latter Court to enable it to exercise in regard to the matter of the request all the jurisdiction which either of the two Courts in question could exercise in regard to similar matters." Vol. II, Laws of England, Bankruptcy and Insolvency, p. 319, citing s. 118 of Bankruptcy Act, 1883, and *Callender Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*(1).

I see nothing to prevent a commission being issued by this Court for the examination of M. P. Talati and H. B. M.'s Supreme Court at Shanghai making the necessary order for his examination thereunder at the request of this Court. Of course I cannot direct M. P. Talati to come to Bombay to be examined, there being no machinery for that purpose. This request to H. B. M.'s Court at Shanghai will also be submitted to me.

The costs of and incidental to the order and rules will be reserved to be dealt with by the judge who hears the case eventually.

Attorneys for M. P. Talati: *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for Abechand: *Mr. M. B. Chothia.*

B. N. L.

(1) [1891] A. C. 460.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

UDERAM KESAJI (PLAINTIFF) *v.* HYDERALLY ABDUL KAYUM (DEFENDANT).* 1908. *October* 15.

Jurisdiction—Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes Court.

The High Court of Bombay has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding in the Small Causes Court at Bombay with a suit filed by the defendant referring to the same matter to which the suit in the High Court relates; or from filing further suits relating to the same subject matter pending the hearing of the High Court suit.

Jairamdas v. *Zamonlal*(1) not followed.

THE plaintiff brought a suit in the High Court on its original side on the 17th September 1908 against the defendant, praying that the lease dated the 18th October 1907 passed by the plaintiff in favour of the defendant be avoided and rescinded and praying that the defendant might be restrained by injunction from proceeding with two suits filed by him in the Court of Small Causes in Bombay and from filing further suits with reference to the same lease.

The said Small Cause Court suits were filed by the defendant against the plaintiff to recover from the latter the rent due under the lease up to the end of April 1908.

On the 28th September 1908 the plaintiff served a notice of motion on the defendant calling upon him to show cause why the two suits filed by him in the Small Causes Court against the plaintiff should not be stayed until the disposal of this suit.

Jinnah for the plaintiff in support of the notice of motion.

The High Court has power to grant the injunction asked for. See *Rash Behary Dey* v. *Bhowani Churn Bhose*(2) and *Mungle Chand* v. *Gopal Ram*(3).

* Suit No. 792 of 1908.

(1) (1903) 27 Bom. 357. (2) (1906) 34 Cal. 97.
(3) (1906) 34 Cal. 101.

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Robertson for the defendant.

The Court has no power to grant the injunction: see *Jairamdas* v. *Zamonlal*[1]. The proper remedy of the plaintiff was to get the Small Causes Court suits removed to the High Court.

If the Court is inclined to grant the plaintiff's application the plaintiff should be put on terms by being required to deposit in Court the amount of the defendant's claim.

MACLEOD, J.:—The plaintiff has filed this suit praying for a declaration that he is entitled to avoid the lease to him by the defendant of certain premises, dated the 18th October 1907, as modified by a writing of the 6th December 1907. Before this suit was filed the defendant had filed two suits Nos. 5309 and 12929 of 1908 in the Small Causes Court for rent due under the said lease. The plaintiff now moves for an order and injunction of this Court to restrain the defendant from proceeding with the said Small Causes Court suits and from filing further suits with reference to the said lease pending the hearing of this suit.

It cannot be denied that as the plaintiff's liability to pay rent under the lease depends on whether he will be successful in avoiding it, it is highly desirable that these suits should be stayed provided the defendant is in no way prejudiced thereby. Mr. Robertson, counsel for defendant, however, argued that the Court had no jurisdiction to grant the injunction.

By the Letters Patent of 1823 the Supreme Court was authorized and empowered to make such further and other interlocutory rules and orders as the justice of the proceeding might seem to require and it was further ordained that the Supreme Court should also be a Court of Equity.

By section 9 of 24 and 25 Vic. c. 104 it was enacted that the High Courts to be established under that Act should have and exercise all such civil jurisdiction, original and appellate, and all such power and authority for and in relation to the administration of justice as Her Majesty might by Letters Patent grant

(1) (1903) 27 Bom. 357.

and direct, and save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the Legislative Powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Courts to be established in each Presidency should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under that Act.

The amended Letters Patent of 1865 are silent on the subject of interlocutory rules and orders but under clause 19 the law or equity to be applied in each case coming before the High Court in the exercise of the ordinary original civil jurisdiction shall be the law or equity which would have been applied by the High Court if the Letters Patent had not issued. It follows, therefore, that the High Court has power to make such interlocutory rules and orders as the justice of the proceeding may require provided they are not directly prohibited by the Letters Patent or by statute.

Section 53 of the Specific Relief Act (I of 1877) is as follows :—

"Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure."

Sections 492 to 497 are the only sections of the Civil Procedure Code of 1882 dealing with temporary injunctions.

Sections 492 and 493 enact that under certain circumstances the Court may grant temporary injunctions.

I am asked to hold that the powers of the Court to grant temporary injunctions are limited to those cases in which the circumstances detailed in sections 492 and 493 exist, and I have been referred to a decision of Russell, J., in *Jairamdas* v. *Zamonlal*[1] as establishing that proposition.

Mr. Robertson argued that that decision was binding upon me on the doctrine of *stare decisis*.

It is necessary, therefore, to consider what was the actual point decided by the learned Judge in that case, because the doctrine does not become applicable unless the point is the same.

(1) (1903) 27 Bom. 357.

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It often happens that when a case is carefully examined it will be found that the judge has not decided what it is argued he has, or that what at first sight may appear to be a principle of general application can only apply to the particular facts of the case. The injunction was refused in that case because it did not come within the terms of sections 492 and 493 of the Civil Procedure Code, but I do not find that it was laid down as an abstract proposition that owing to the provisions of those sections the Court could not grant a temporary injunction in exercise of its inherent equitable powers to do what was justice and for the advantage of the parties.

The passage from Blackstone on the rule of *stare decisis* quoted by Davar, J., in *Jamshedji C. Tarachand* v. *Soonabai* (1) refers more to the days when judicial decisions were considered as enunciations of what was the common law of England. The principles to guide one in applying the rule appear in more modern form in the American and English Encyclopædia of Law, 2nd Edition, Vol. 26, from p. 158 onward.

The passages I quote are especially valuable as the position of the Courts of the various States in America as regards their respective decisions is very much the same as that of the various High Courts in India.

"*Decisions of co-ordinate Courts.* To secure uniformity of decisions a Court will, as a general rule, adhere to a principle laid down by a Court having co-ordinate jurisdiction until it is changed by the decision of a higher Court . . . The rule however is not considered absolutely binding but may be departed from in the discretion of the Court. So a Court will not follow the decisions of a co-ordinate Court where they are evidently made through mistake or are so clearly erroneous that the error is undoubted."

"*Single decisions.* Distinction has also been drawn in the application of the doctrine of *stare decisis* where only one decision is relied upon as establishing the doctrine. For a variety of reasons a series of decisions will be given more

(1) (1907) 33 Bom. 122 at p. 147.

weight than a single decision. There is less likelihood of error; any previous decision or statutes overlooked in the one may be considered in subsequent cases."

"Also the opinion and decision of a Court must be read and examined as a whole in the light of the facts upon which it is based, and not applied by picking out particular parts or sentences. The facts are the foundation of the entire structure, which cannot with safety be used without reference to the facts. The decision is only an authority for what it actually decides and cannot be quoted for a proposition which may seem logically to follow from it."

The last passage is especially pertinent to the present case, as it is only by inference that it can be said that the learned Judge laid down the abstract proposition above referred to. The decision by itself amounts to this, that the injunction was refused in that particular case because it did not come within the terms of sections 492 and 493 of the Civil Procedure Code.

But the question whether the powers of the High Court are limited by the provisions of the Civil Procedure Code is dealt with exhaustively by Woodroffe and Mookerjee, JJ., in *Hukum Chand Boid* v. *Kamalanand Singh*[1].

At page 931 Woodroffe, J., says:—

"The Code does not as I have already had occasion to hold, *Punchanon Singh* v. *Kunuklota Barmoni*[2] affect the power and duty of the Court, in cases where no specific rule exists, to act according to equity justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature . . . The Court has, therefore, in many cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to act *ex debito justitiæ* and to do that real and substantial justice for the administration, for which it alone exists. It has thus been held that, although the Code contains no express provision on the matters hereinafter mentioned, the Court has an inherent power *ex debito justitiæ* to consolidate. . . . These instances (and there are others) are sufficient to show, firstly that the Code is not exhaustive and, secondly, that in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice between the parties."

(1) (1905) 33 Cal. 927. (2) (1905) 3 C. L. J. 29.

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At p. 940, Mookerjee, J., says :—

"I entirely repudiate the theory that our powers are rigidly circumscribed by the provisions of the Code, and that we have no power to make a particular order, though it may be absolutely essential in the interest of justice, unless some section of the Code can be pointed out as a direct authority for it . . . Such a theory, moreover, is entirely inconsistent with various decisions of the Judicial Committee and of the different High Courts of this country, among which I need only mention those in the cases of *Ram Kirpal* v. *Mussumat Rup Kuari* (1) . . . *Surendranath Banerjea* v. *The Chief Justice and Judges of the High Court of Bengal*(2)" &c.

Section 53 of the Specific Relief Act merely states that temporary injunctions are regulated by the Code of Civil Procedure, it does not enact that the Court shall grant only such temporary injunctions as are provided for in the Code. So that Mr. Robertson's argument could only prevail if the Code had prescribed that the Courts should only grant temporary injunctions under the particular circumstances detailed therein and no others. That this is not the effect of sections 492 to 497 has been decided in *Rash Behary Dey* v. *Bhowani Churn Bhose*(3) and *Mungle Chand* v. *Gopal Ram*(4).

In my opinion I am at liberty to follow those decisions.

I therefore grant the injunction asked for but as the defendant might be prejudiced in the event of the plaintiff failing in this suit I direct as suggested by counsel during the argument that plaintiff do bring into this Court within one week Rs. 1,450 the total of the amounts sued for in the Small Causes Court suits.

Costs of the motion to be costs in the cause.

Attorneys for plaintiff : *Messrs. Jehangir, Mehta and Somji.*

Attorneys for defendant : *Messrs. Pestonji, Rustim and Kola.*

B. N. L.

(1) (1883) L. R. 11 I. A. 37.
(2) (1883) L. R. 10 I. A. 171.
(3) (1906) 34 Cal. 97.
(4) (1906) 34 Cal. 101.

ORIGINAL CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

ESMAIL EBRAHIM (APPELLANT AND PLAINTIFF) *v.* HAJI JAN MAHOMED HAJI MAHOMED (RESPONDENT AND DEFENDANT).* 1908. *November* 16.

Civil Procedure Code (Act XIV of 1882), sections 102, 103, 117—Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present—Practice.

Sections 102 and 103 of the Civil Procedure Code do not apply when the plaintiff is present in Court. Notwithstanding the non-appearance of the plaintiff's Counsel the Court can under section 117 of the Code ask the plaintiff questions relating to the suit and can examine his witnesses or suggest that he should instruct some other Counsel to examine the witnesses.

The rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend until he can come in.

THESE were two appeals from the orders of Mr. Justice Russell dated the 24th day of August 1903, the first refusing the application of the plaintiff to have the suit restored to the board and the second against the decree dismissing the suit with costs.

The plaintiff filed this suit to recover certain monies from the defendant in respect of certain Hoondies drawn by the plaintiff in favour of the defendant. The suit was called on before Russell, J., on the 17th August 1908, at a time when neither of the plaintiff's Counsel could attend the Court. The defendant raised issues and then another Counsel was instructed on behalf of the plaintiff to apply for a postponement. This was refused and the suit was dismissed with costs. An application was made under section 103 of the Civil Procedure Code for the restoration of the suit but this was refused with costs.

* Appeals Nos. 43 and 44 of 1908 : Suit No. 256 of 1907.

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The plaintiff thereupon filed these two appeals.

Jinnah and Setalvad for appellant.

The suit was called on very unexpectedly on August 17th. On that day there were two long causes and one commercial cause down for trial before this suit. These earlier suits suddenly collapsed and this suit was called on at 12-15 o'clock. At that moment both the plaintiff's Counsel were engaged addressing other Courts. The plaintiff was physically present in Court. The question then arises whether where a plaintiff has instructed Attorneys and has signed a warrant in their favour authorising them to appear and conduct the case on his behalf and his Attorneys have instructed Counsel and have duly briefed them the mere fact of the plaintiff's physical presence in Court can be said to be an appearance under section 102. See *Gopala Row* v. *Maria Susaya Pillai*[1], Sir Arnold White's judgment. According to that case the mere fact of the party's physical appearance in Court does not mean that he appeared under section 102. The words 'appear in person' have a well defined meaning, *viz.*, when a party appears to conduct his own case without any Attorneys or Counsel. The fact that another Counsel was instructed to apply on behalf of the plaintiff for a postponement does not mean that there was any appearance on behalf of the plaintiff. See also *Shibendra Narain Chowdhuri* v. *Kinoo Ram Dass*[2], *Manilal Dhunji* v. *Gulam Husein Vazeer*[3].

The defendant brought into Court Rs. 207-8. The Court ought to have in any event passed a decree for this amount in favour of the plaintiff under section 102 which says that if the defendant appears and the plaintiff does not appear the Court shall dismiss the suit unless the defendant admits the claim or part thereof in which case the Court shall pass a decree against the defendant upon such admission.

Lowndes and *Strangman*, Advocate-General, for the respondent.

SCOTT, C. J.—In this case the plaintiff sued the defendant for eight thousand three hundred rupees. The defendant put in a

(1) (1906) 30 Mad. 274 at p. 276. (2) (1886) 12 Cal. 605.
(3) (1888) 13 Bom. 12.

written statement admitting the claim to the extent of Rs. 207 only which he brought into Court. The suit was called on on the 17th August and the plaintiff was present in Court with his Attorneys' clerk and his witnesses ready to proceed with the hearing of the suit, but the two Counsel whom he had instructed were both absent. The defendant's Counsel appeared and raised issues and another Counsel was instructed by the plaintiff's Attorneys' clerk to apply for an adjournment which, however, was not granted. The Court after waiting for some time for the plaintiff's regularly instructed Counsel to appear, on their non-appearance, dismissed the suit with costs.

It is clear that the order of dismissal cannot stand because the plaintiff was entitled to a decree for the sum of Rs. 207 brought into Court, and as it is necessary for us to pass a decree for that amount at least, we think it is open for us to reconsider the whole case.

The plaintiff has filed two appeals, the first an appeal against the order which was made under section 103 of the Civil Procedure Code and the second an appeal against the decree dismissing his suit.

In our view sections 102 and 103 of the Code do not apply because the plaintiff was present in Court. He did appear and he was ready to go on with his suit as far as his own evidence and that of his witnesses was concerned, and the Judge notwithstanding the non-appearance of the plaintiff's Counsel could under section 117 of the Code have asked the plaintiff questions relating to the suit and could have examined his witnesses or suggested that he should instruct some other Counsel to examine the witnesses. We do not think that it can be reasonably contended that the plaintiff did not appear, and if he did appear then there is no case for the application of sections 102 and 103.

We think, however, that having the case now before us in consequence of the Judge's error in not passing a decree for the plaintiff for the sum of Rs. 207 brought into Court, we ought in the interests of justice to set aside the decree and direct a new trial.

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In making this order, however, it is necessary that we should protect the defendant from loss in consequence of the expenses that he has been put to. The plaintiff must, therefore, pay the costs of the day incurred on the 17th August, the costs of the order passed on the application under section 103, the costs of and incidental to the drawing up of the decree dismissing the suit and the costs of both these appeals.

The result will be heavy costs upon the plaintiff owing to the neglect of his Counsel. In this connection it seems necessary to remind the Bar that the rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges shortly after the establishment of the High Court when several Divisional Courts sat simultaneously on the Original Side. The rule was introduced in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend till he can come in. If members of the Bar disregard their obligations in such cases the justification for the two Counsel rule will cease to exist and the rules for taxation between party and party will have to be revised by the Judges.

The payment of the costs, which we have ordered, will be a condition precedent to the hearing of the suit, the defendant undertaking to have his costs taxed and the allocatur served within three weeks.

Attorneys for the appellant: *Messrs. Wadia, Gandhy & Co.*

Attorneys for the respondents: *Messrs. Payne & Co.*

B. N. L.

APPELLATE CIVIL.

Before Sir Basil Scott, Chief Justice, and Mr. Justice Batchelor.

CHHAGANLAL KISHOREDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI HARKHA (ORIGINAL DEFENDANT No. 2), RESPONDENT.*

1909. *March* 23.

Civil Procedure Code (Act XIV of 1882), sec. 13—Res judicata—Plea of res judicata can prevail even where its effect is to sanction what is illegal—Bhágdári and Narwádári Tenures Act (Bombay Act V of 1862), sec. 3.†

A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute.

SECOND appeal from the decision of Chimanlal Lallubhai, First Class Subordinate Judge, with appellate powers, at Ahmedabad, confirming the decree passed by B. G. Desai, Subordinate Judge at Kaira.

Suit to recover rent.

The property, with respect to which the suit was brought, belonged to Govind and Gokul. It formed a portion of a bhág or share; any alienation, assignment, &c., of which was prohibited by the Bhágdári and Narwádári Tenures Act (Bombay Act V of 1862), sec. 3.

The lands in dispute which formed an unrecognised sub-division of a bhág, were mortgaged by Govind and Gokul to Chhaganlal Kishoredas (plaintiff) with possession on the 3rd February 1893. On the same day Govind passed a lease to the plaintiff for a term of five years. There were many other subsequent leases, the last of which was passed by Govind for a period of one year on the 10th September 1902. Even after the

* Second Appeal No. 244 of 1908.

† The section runs as follows:—

3. It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any bhág or share in any Bhágdári or Narwádári village other than a recognized sub-division of such bhág or share, or to alienate, assign, mortgage or otherwise charge or incumber any home-stead, building-site (gabhán) or premises, appurtenant or appendant to any such bhág or share, or recognised sub-division, appurtenant or appendant thereto, apart or separately from any such bhág or share or recognised sub-division thereof.

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expiry of this period, Govind remained in possession of the lands till his death which took place in June 1905. After his death, his widow Bai Harkha (defendant 2) cultivated the lands on behalf of herself and her minor son Ambalal (defendant 1).

During Govind's life-time, he was sued by the plaintiff for rent for the years 1902-03 and 1903-04 and an *ex parte* decree was passed against him.

The plaintiffs now sued the defendants to recover from them rent for the years 1904-05 and 1905-06.

Defendants contended (*inter alia*) that the land in suit was Narwa land, and that the sale or mortgage thereof in favour of any person other than a Narwádár was invalid and that it could not be dismembered, and that as the plaintiff could not get possession of the land under the Bhágdári Act he could not claim the rent thereof.

The Court of first instance held that the mortgage in favour of the plaintiff was illegal, and the lease of the land on the basis of the said mortgage was invalid, and that the plaintiff could not recover damages in lieu of rent.

On appeal, the only issue raised in the lower appellate Court was: "Are the defendants-respondents estopped from denying the title of the plaintiff-appellant and are they liable for the amount claimed by the plaintiff-appellant?". This issue was found in the negative.

The plaintiff appealed to the High Court.

H. C. Coyaji (with *L. A. Shah*), for the appellant:—We concede that the mortgage in our favour is void under the Bhágdári Act, 1862; but the lease which has been passed to us is not on that account void. The lessee Govind paid to us rent for a number of years, and even allowed an *ex parte* decree for rent to be passed against him. Refers to *Rungo Lall* v. *Abdool Guffoor*[1]; *Venkatesh Narayan Pai* v. *Krishnaji Arjun*[2]; *Balaji* v. *Ramchandra*[3]; *Patel Kilabhai* v. *Hargovan*[4]; *Morton* v. *Woods*[5]; *Seshamma Shettati*

(1) (1878) 4 Cal. 314.
(2) (1875) 8 Bom. 160.
(3) (1902) 27 Bom. 262.
(4) (1894) 19 Bom. 133.
(5) (1869) L. R. 4 Q. B. 293.

v. *Chickaya Hegade*[1]. The decree in the previous suit operates as *res judicata*: *Dwarka Das* v. *Akhay Singh*[2]; *Jamadar Singh* v. *Serazuddin Ahamad Chaudhuri*[3].

Ratanlal Ranchhoddas for the respondent:—We submit that not only is the mortgage void under the Bhágdári Act, 1862; but the lease also shares the same character, it being an alienation of an unrecognized division of a bhág under section 3 of the Act.

The decree against Govind being *ex parte* cannot operate as *res judicata*: *Modhusudun Shaha Mundul* v. *Brae*[4]. Further, where the effect of *res judicata* is to validate what has been specifically prohibited by statute the plea should not be allowed to prevail; otherwise, it would be open to the parties to effect transactions in an indirect way, which they cannot do in face of the statute.

SCOTT, C. J.:—On the 3rd of February 1903 a possessory mortgage of certain Bhágdári land was executed by Govind Khodabhai and his brother in favour of the plaintiff. On the same day Govind passed a tenancy agreement to the plaintiff whereby he took the land as lessee for five years. Further agreements of a similar nature were subsequently executed by Govind in the plaintiff's favour the last being of the 18th September 1902 for one year. After the expiry of that year Govind continued in possession of the land until his death in June 1905. On his death his widow the second defendant cultivated the land on behalf of herself and the first defendant her minor son. This suit has been brought by the plaintiff to recover the rent of the land for two years namely 1904-5 and 1905-6. No objection has been taken that rent accruing due in the life-time of Govind is not claimable against the defendants personally in this suit. The plaintiff comes here in special appeal having failed in both the lower Courts.

The land the subject of the mortgage and of the tenancy agreements is Bhágdári land, part of a Narwa, but not a recognised sub-division of a share or Bhág: the mortgage is therefore unlaw-

(1) (1902) 25 Mad. 507.
(2) (1908) 30 All. 470.
(3) (1908) 35 Cal. 979.
(4) (1889) 16 Cal. 300.

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ful and void under section 3 of the Bhágdári Act (Bombay Act V of 1862). It is argued on behalf of the defendants that the tenancy agreements whether express or implied under which the mortgagor Govind and his heirs have remained in possession are void as being alienations tainted with the same vice as the principal transaction and that rent is therefore not recoverable. For the plaintiff it is contended that not only are these arguments unsound but also that they are no longer open to the defendants because the plaintiff's right to recover rent has been established by an *ex parte* decree against Govind obtained by the plaintiff for rent in respect of the years 1902-3 and 1903-4. It is argued that the questions now raised by the defendants might and ought to have been raised in the suit in which the decree was obtained and must be taken to have been decided against the plaintiff since they claim title merely by virtue of their heirship to Govind. It cannot be disputed that if the points now raised by the defendants are good they would have been equally good for the purposes of defence in the previous suit; they ought therefore to have been raised. It was however suggested by the pleader for the defendants that a plea of estoppel by *res judicata* cannot prevail where the result of giving effect to it will be to sanction what is illegal. This however is not the law. No such limitation is contained in section 13 of the Code of 1882. If the legality of an act is a point substantially in dispute it may be a fair subject of compromise in Court like any other disputed matter and thus become *res judicata*: see *Great North-West Central Railway* v. *Charlebois* (1); similarly if it is abandoned or not put forward by a defendant it must, having regard to the provisions of section 13, be deemed to have been decided against him. The defences raised are therefore not now open to the defendants and the plaintiff is entitled to the rent claimed.

We reverse the decree of the lower Courts and pass a decree for the plaintiff for the amount claimed with costs throughout.

Decree reversed.

R. R.

(1) [1899] A. C. 114 at p. 124.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

1909.
April 7.

THE TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY (ORIGINAL OPPONENT NO. 1), APPELLANTS, *v.* JALBHOY ARDESHIR SETT AND ANOTHER (ORIGINAL CLAIMANT AND OPPONENT NO. 2), RESPONDENTS.*

Land Acquisition Act (I of 1894), section 23—"Market value of land"—Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bombay Act IV of 1898)—Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references.

The Government of Bombay, acting on behalf of the Improvement Trustees, under the City of Bombay Improvement Act (Bombay Act IV of 1898), notified for acquisition nine parcels of land in December 1898. At the date of the notification, J., the owner of the parcels, was in unencumbered possession of only one of them; and the remaining parcels were let on permanent leases as building sites. Between the dates of notification and acquisition, J. bought out the interests of the tenant in one of the parcels. The situation of the land was such that the whole plot consisting of the nine parcels was capable of forming a valuable quarry. The Collector in assessing compensation dealt with all the parcels separately; and refused compensation on a quarrying basis. As regards the seven parcels, the award was arrived at on a rental basis. In all the nine cases, references were claimed and made to the Tribunal of Appeal constituted under section 48 of the City of Bombay Improvement Act (Bombay Act IV of 1898). After the Collector had made his award and before the references were heard, J. bought out the tenants' rights in the seven parcels. J. next applied to the Tribunal of Appeal for consolidation of the references into one: this was allowed. The Tribunal of Appeal allowed J.'s claim for compensation for the whole land on a quarrying basis. On appeal, it was objected that the consolidation was wrongly allowed for J. was thereby permitted to advance a claim—namely the claim to the quarrying value—which otherwise he would not have been able to make.

Held, that the consolidation was rightly allowed and had not the effect which was contended for. It was not by reason of the consolidation of references that J. was enabled to put forward what might be called the quarrying claim: that claim was already before the Collector and the Tribunal, and, whether good or bad, had to be decided on quite other grounds than the arbitrary division of the land made by the Collector.

* First Appeal No. 80 of 1908.

1909.

BOMBAY IMPROVEMENT TRUST v. JALBHOY.

Held, further, that compensation should not be assessed on a quarriable basis, for the land was never a marketable quarry at the material time, and did not become so till after the Collector had made his award.

Per BATCHELOR, J.:—For the purposes of ascertaining the market value of land under section 23 of the Land Acquisition Act (I of 1894), the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it.

Collector of Belgaum v. *Bhimrao*(1) followed.

The method contemplated by the Land Acquisition Act (I of 1894) for assessing compensation is that of ascertaining first the market value of the land as if all separate interests combined to sell; and then of apportioning that value among the persons interested. The "market value of the land" means the price which would be obtainable in the market for a concrete parcel of land with its particular advantages and its particular drawbacks, both advantages and drawbacks being estimated rather with reference to commercial value than with reference to any abstract legal rights.

Per HEATON, J.:—Taking the scope of the Land Acquisition Act (I of 1894) and its words, it seems that in ascertaining compensation for land taken up neither the method of valuing each interest in it separately nor the method of valuing the land as a whole and then apportioning to each person interested the share to which he is entitled, is excluded. What is intended is a fair and reasonable estimate of the compensation to be awarded: and this is to be arrived at by taking into consideration certain specified matters and excluding from consideration others. The Act seems to leave a great deal to the discretion of the Collector and the Court, and amongst other matters, to leave it to their discretion to ascertain the market value of the land by either of the two methods. This opinion does not conflict with what was decided in *Collector of Belgaum* v. *Bhimrao*(1).

APPEAL against the decision of Tribunal of Appeal appointed under section 48 of the City of Bombay Improvement Act (Bombay Act IV of 1898).

In December 1898, the Government of Bombay, acting on behalf of the Trustees for Improvement of the City of Bombay, published a notification for acquiring a piece of land belonging to one Jalbhoy. The piece consisted of nine parcels of land. The situation of the piece on the top of a cliff was such that it formed by itself a valuable quarry.

At the date of the notification Jalbhoy was in unencumbered possession of one parcel alone. The remaining parcels were let

(1) (1908) 10 Bom. L. R.

out by him as building sites on permanent tenure. After the notification and before the date of the award by the Collector, Jalbhoy purchased tenants' right in one more parcel.

The Collector valued all the nine plots separately on the rental basis and awarded Rs. 11,803-14-8 as compensation to Jalbhoy for the whole piece of land.

On Jalbhoy's application, the Collector referred all the nine cases to the Tribunal of Appeal.

After the date of the Collector's award and before the references came on for hearing before the Tribunal of Appeal, Jalbhoy bought the tenants' rights in the seven remaining parcels. This made him the owner of all interests in all the nine plots of land.

Jalbhoy next urged upon the Tribunal of Appeal to consolidate all the nine cases into one, as he had become owner of all interests in the whole piece consisting of nine parcels of land. The consolidation prayed for was allowed and the cases were heard together as one appeal.

Before the Tribunal of Appeal, Jalbhoy claimed compensation for the whole piece on a quarryable basis. The Tribunal allowed the claim and fixed the amount of compensation to be awarded to Jalbhoy at Rs. 42,364. The grounds of the decision were as follows:—

It was argued that the purchase of the tenants' rights long after the date of Declaration disentitled the claimant to any quarrying rights, and these rights were destroyed by his having let the land for building purposes on a permanent tenure. It was also argued that at any rate, at the date of the Declaration, the tenants were parties entitled to a part of the compensation in their own rights.

We have to consider therefore if the tenants' interest, which the claimant has purchased from the several tenants of the seven plots, falls under the purview of section 49 (2). If it does, the claimant's right to claim compensation for the quarry becomes very questionable.

The effect of a notification under the Act is to put an end to the right of the parties to interfere with the land or to add anything to its value, so as to become entitled to enhanced compensation. The valuation of the land to be acquired must be made, keeping in view the market value that a prudent purchaser would pay at the date of the Declaration. The question therefore to determine was, what was the value of the land on that date.

In the present case what we have to consider is, whether there is any interest created or enlarged by the claimant, after the date of notification, so as to

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increase the amount of compensation to be paid for the land, under section 49 (2). It seems not. The right to quarry was in the owner of Nowroji Hill and till within the last 10 years quarrying had been carried on quite close to the plots in question. We think the right was not totally destroyed by the letting of the plots for building purposes, but was simply kept in abeyance during the occupation of the land by the tenants.

The owner of the Hill was, so as to say, possessed of the freehold. He owned the soil and had the right to quarry, but that right he could not exercise so long as his tenants occupied the land. That right would revive, and he would become repossessed of it at any time he bought out the tenants.

The claimant was the only person to appear before the Tribunal claiming full compensation for all interests. The tenants did not appear, and did not make any claim.

Under these circumstances, if this view was correct, it would follow that no new interest was created after the date of Notification, nor was any interest that previously existed enlarged after that date. The interest in the right to quarry was there; it was in abeyance for a time. The tenants, who had taken the land on lease for building purposes, had no right to quarry; they were entitled to the use of the surface-land only. When, therefore, the landlord bought out the tenants' building rights, he became repossessed of what he originally had as the owner of the soil in the seven plots. As to plots 505 and 510 there was no dispute and claimant was admittedly the owner of all interests in them.

The case presents another difficulty; for, if each plot is taken separately it is so very small in size that it would not be possible to carry on quarrying operations with safety. In that case we think it fair that something extra should be allowed for the chance of acquiring the other plots so as to get a quarriable area.

Under the Land Acquisition Act, section 23, we have to ascertain the market value of the land. To do this, it has been held by my predecessor in office that it was not necessary to value the interests of the landlord and the tenant separately, but all interests should be valued together. In reference No. 22 of 1905, Mr. Macleod said that it was not intended that the Collector should split up interests and value them separately and independently; as for instance to treat a landlord's interests and a tenant's interests in the same land as distinct things to be valued apart from each other.

The treatment of the different References as one Reference strengthened claimant's contention demanding compensation for his quarry rights. The question for decision is an important and difficult one, and I have consequently expressed my willingness to grant a certificate of Appeal to the High Court. We are inclined however to hold and we find that claimant has not acquired any new or enlarged interest in terms of section 49 (2) so as to increase the amount of compensation to be paid for the land.

The Tribunal further worked out alternatively compensation on a rental basis : and in doing so, they remarked as follows :—

"If the method adopted by us for the above valuation is not accepted by the High Court, the other method to follow would be to determine what a prudent purchaser would pay on valuing each plot separately and allowing some extra value in consideration of the chance of acquiring the adjoining plots so as in the end to get a large quarriable area. In that event we would adopt the valuation made by the collector, but with this modification that instead of allowing $14\frac{2}{7}$ years' purchase as he has done, we would increase the number of years' purchase to 18·18."

The Trustees appealed to the High Court.

Lowndes and *Jardine* (with Messrs. *Crawford, Brown and Company*) for the appellants :—It is not competent to the claimant to acquire a new interest in the plots after the date of the Notification issued under the Land Acquisition Act (I of 1894). The claimant Jalbhoy bought up the tenant's rights in seven plots after the date of the Collector's award. But as soon as the Collector's award was made, the land vested absolutely in His Majesty under section 50 of the City of Bombay Improvement Act, 1898. The tenants had no other interest left to them except the right to receive compensation awarded, and Jalbhoy cannot claim to have got anything more than such right by reason of the said purchase.

The Tribunal of Appeal erred in allowing the cases to be consolidated before them. The consolidation cannot be allowed where its effect is to enable a party to put forth a claim which he could not make if the consolidation were not allowed.

Further, the Tribunal have erred in valuing the land here on the basis of an unencumbered free-hold and then proceeding to divide the amount into different interests. Property to be acquired must be valued *rebus sic stantibus* at the date of declaration. Land in the abstract can have no market value. There can be no such thing as the market value of land in the abstract separate from the interests therein. What one buys in the market is the interest in the land. The market value of land must mean the aggregate value of various interests in it. The words used in a conveyance of land are always "the right, title and interest of X. Y. Z."

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The difficulty of attempting to value land in the abstract will be apparent from the following instances :—

(1) It has been held by the Privy Council that the Collector's award is merely an offer made on behalf of Government. If the Collector is to value in the abstract, how can he make an offer to various persons having an interest in the land? In *In re Esufali Salebhai* (1) Macleod, J., has held that the term "claimant" in the Land Acquisition Act, 1894, means the aggregate body of claimants and that the offer has to be made to the claimants as a body. I submit that this is not a right interpretation.

(2) The land is acquired free from all incumbrances, *e. g.*, easements How can you value land in the abstract free from easements? The easements might be more valuable than the land and you must value them separately.

(3) In cases of Toka tenure, the interest of the Toka tenant has a market value and is sold every day. Free-hold is never sold. It was held that the Government was not a party interested in the valuation of Toka tenure land under the Land Acquisition Act. The City of Bombay Improvement Act was, therefore, amended subsequently so as to make the Government a party interested.

(4) In lands held on Sanad tenure, there is a chance of Government resuming the land. How can you value such land as unencumbered free-hold? If you do, how can you apportion the interest of Government, which is merely a chance of Government resuming the land?

I submit that even under the Land Acquisition Act the separate interests in land and not land in the abstract are to be valued. Section 9 of the Land Acquisition Act speaks of claims to compensation for all interests in the land. Section 11 also refers to interests in the lands, sections 19, 20, 21 and 23 contemplate separate awards of compensation in case of persons holding separate interests in the lands. The whole scheme of the Land Acquisition Act is to compensate ndividuals for their separate interests. The principles of English Law, therefore apply here,

(1) (1908) 10 Bom. L. R. 994 at p. 998.

according to which the value to the owner and not to the acquiring body is to be determined and awarded. See *Stebbing* v. *Metropolitan Board of Works* [1]; *Penny* v. *Penny* [2]; *Abrahams* v. *Mayor, Aldermen, and Commons of the City of London* [3]; Cripps on compensation (4th Edn.), p. 109.

The appellants further submitted that owners of separate properties cannot combine so as to secure a larger value for their combined properties. Value of a large area made up of irregular plots if sold as one plot would be much larger than the aggregate values of the separate irregular plots. Such valuation is not allowed, for by so valuing you would be giving each separate owner more than he is entitled to by way of compensation for his interest. See *Mayor of Tynemouth and Duke of Northumberland* [4].

You may give something more for the possibility of the claimant acquiring the adjacent lands and thus increasing the value of his interest. But the possibility must not be very remote. The tenants in the present case are Fazandar tenants and have a permanent interest in the land. Jalbhoy is the Fazandar and has the right to receive the ground-rent and nothing else. The tenants are the owners of the land subject to the payment of ground-rent, there being no power of re-entry in Jalbhoy. The tenants and Jalbhoy, therefore, cannot combine.

Further, it is not the tenants who come and ask to combine but a person who has bought up the tenants' rights after the notification. No difference exists between an outsider and a Fazandar buying up the tenants' rights. If the tenants cannot claim to combine, how can a person who has bought their rights do so?

As regards the principle of valuation, the observations in *Government of Bombay* v. *Merwanji Muncherji Cama* [5] and *Collector of Belgaum* v. *Bhimrao* [6] are against me.

The true principle is to value the interest of each holder of a tenure and give him a sum equivalent to the purchase-money of

(1) (1870) L. R. 6 Q. B. 37 at p. 41.
(2) (1867) L. R. 5 Eq. 227 at p. 235.
(3) (1868) L. R. 6 Eq. 625 at pp. 629, 633.
(4) (1903) 19 T. L. R. 630.
(5) (1908) 10 Bom. L. R. 907 at p. 918.
(6) (1908) 10 Bom. L. R. 65.

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such interest: *Dinendra Narain Roy* v. *Tituram Mukerjee*[1]; *Fink* v. *Secretary of State for India*[2]. These cases were decided under the Land Acquisition Act. But the present case falls under section 49 (2) of the City of Bombay Improvement Act. It shows pointedly that you must value the separate interests separately.

Jalbhoy is not entitled to valuation on the quarrying basis. Originally, there were two alternatives before the owner of these plots. (1) Hanging on to the land without the prospect of any return in the immediate future on the chance of quarrying it later on when the same could be profitable, or (2) letting out the land immediately for building purposes and getting an immediate return for the same. The owner here chose the second alternative and got a large return during these years. He cannot now claim the profits of quarrying.

Strangman (Advocate General) with *Inverarity* (instructed by *Pestonji, Rustam* and *Kola*) for the respondent.—The question as to how the value is to be assessed resolves itself into two other questions. (1) Is it land or various interests in land which are to be valued; and (2) Is the Collector to be allowed to prejudice the owner by splitting up the land as he thinks fit and making separate cases and separate awards for the parcels into which the land is split up. I submit, the answer to the first question is land; and the second question must be answered in the negative. As to the first question, I rely on the plain meaning of sections 3*a*, 4, 6, 9, 11, 18, 20, 21, 22, 29 and 30 of the Land Acquisition Act; and on the case of *Collector of Belgaum* v. *Bhimrao*[3]. If the argument of the appellants is to be given effect to then you must substitute "market value of the separate interest in the land," for the phrase "market value of land" in section 23 of the Land Acquisition Act, 1894.

In the present case, Jalbhoy was the common owner of the soil and the quarry. It is quite immaterial to what use the owner may have put his land. If you treat the interests as having

(1) (1903) 30 Cal. 801. (2) (1907) 34 Cal. 599.
(3) (1908) 10 Bom. L. R. 657.

combined, then why not assume a combination for a common owner. The claimant was at the date of the declaration entitled to the value of the land on the quarrying basis minus what it would cost him to buy out the tenants. The market value is what a purchaser would give for all the interests combined.

Lowndes in reply:—Once you assume combination there is no obstacle to valuing the land on a quarriable basis. But the combination must either rest on fact or be assumed in law. There is none in fact, under what law then can it be assumed? The whole scheme of the Land Acquisition Act is compensation; therefore the enquiry must be what is the man losing? The Court cannot undertake to "compensate" for land in the abstract. The English practice is to compensate for separate interests. See Lands Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 18), sections 9, 12, 15, 16, 18; Housing of the Working Classes Act (53 and 54 Vic., c. 70), section 21 (1).

BATCHELOR, J.:—This is an appeal from a decision of the Tribunal of Appeal appointed under section 48 of the City of Bombay Improvement Act, 1898, and has reference to the amount of compensation to be awarded to the claimant, Jalbhoy Ardesir Sett, in respect of nine parcels of land which have been acquired by Government for the Improvement Trustees under the Improvement Act, 1898. The compensation awarded by the Special Collector was Rs. 11,803, and on appeal to the Tribunal this sum was increased to Rs. 42,364 with interest at 6 per cent. on Rs. 30,560. Against this award the Improvement Trustees bring the present appeal, contending that the Tribunal has applied wrong principles in assessing the compensation and that an excessive sum has consequently been allowed.

The facts are not in dispute, and for present purposes may be shortly stated as follows. In December 1898 the nine parcels were notified in connection with a scheme under section 27 of the Improvement Act, and at that time Jalbhoy was in unencumbered ownership of only one of the parcels, No. 505, the others being let on leases. The land is such that the whole plot, consisting of the nine parcels, forms in itself a valuable quarry, but it is not profitable to quarry any small area such as a single parcel.

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Between the notification and the acquisition Jalbhoy bought out the interest of the tenant of parcel No. 510. In acquiring the land the Special Collector dealt separately with parcels 505 and 510, to which apparently a part of No. 512 was also added, and refused Jalbhoy's claim to receive compensation on a quarrying basis. Jalbhoy appealed to the Tribunal, his general claim for quarrying value being included in the reference. As to the remaining parcels, the Collector made separate awards, valuing the house-holders' interests on a rental basis, and assessing the interest of Jalbhoy as Fazandar at 25 years' purchase of the rents. None of the tenants claimed a compensation reference to the Tribunal, but Jalbhoy did claim this reference in each case, and in each case he made it without prejudice to his general claim for quarrying value as embodied in his appeal regarding parcels 505, 510 and 512. After the Collector had made his award, and before the references to the Tribunal came on for hearing, Jalbhoy bought out all the remaining tenants. When the references were taken up by the Tribunal, Jalbhoy applied that they should be consolidated and that his claim for compensation on a quarrying basis should be allowed. Mr. Lowndes's first objection to the decision under appeal is that the Tribunal was wrong in allowing the references to be consolidated with the result that Jalbhoy was thus permitted to advance a claim—namely, the claim to the quarrying value—which otherwise he would not have been able to make. But in my opinion the consolidation had not this effect, and was rightly allowed. Mr. Lowndes concedes that Jalbhoy could not be prejudiced by any parcelling out of the land which the Collector might choose to make, and, that being so, the objection seems to me to fail. For it was not by reason of the consolidation of references that Jalbhoy was enabled to put forward what may be called the quarrying claim: that claim was already before the Collector and the Tribunal, and, whether good or bad, had to be decided on quite other grounds than the arbitrary division of the land made by the Collector. Moreover it must be remembered that Jalbhoy as Fazandar owner of some of the plots and as lessor of the others with the prior right of buying out the lessee had an interest in the whole area acquired.

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To pass now to the main argument which has been addressed to us: it turns upon the meaning of the words "the market value of the land" in section 23 of the Land Acquisition Act. The Advocate General has contended that the compensation to be awarded must be ascertained by reference to the value of the land itself considered, as he put it, as unencumbered freehold, that is, on the assumption that all interests combine to sell; Mr. Lowndes, on the other hand, has urged that the true meaning of the Act is that compensation should be awarded by the valuation of the separate interests existing in the land. It appears to have been assumed at the bar that the choice between these alternative constructions must determine the result, but for my own part I am not clear that such an assumption is well founded. However that may be, I think that the point in controversy is, so far as this Court is concerned, concluded by the case of *Collector of Belgaum* v. *Bhimrao*[1]. While that case stands, I can see no room for the appellants' present contention, and I did not understand Mr. Lowndes to suggest that the contention could be allowed under the Land Acquisition Act so long as the case retains its authority. The decision, to which I was a party, is a decision of this Appeal Court and has the high authority of Jenkins, C. J., who in delivering the judgment laid down that for the purposes of ascertaining the market value of land under section 23 of the Land Acquisition Act "the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it." That, as I understand it, was said in general terms upon the construction of the Act, and formed the *ratio decidendi*. So far as the Land Acquisition Act is concerned, I think the ruling is decisive, and it is of course binding upon us now. The only ground upon which Mr. Lowndes sought to avoid this decision was, if I followed his argument correctly, that here the land was acquired not under the Land Acquisition Act, but under the Bombay City Improvement Act. The distinction certainly exists, but in my opinion it is not material. For the Improvement Act incorporates the relevant provisions of the Land Acquisition Act, including section 23, and I can find no good reason for supposing that

(1) (1908) 10 Bom. L. R. 657.

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the Improvement Act intends, or operates, to effect a fundamental change in the methods of the Land Acquisition Act. No such far reaching effect ought, I think, to be given to section 49 (2) of the Improvement Act, which merely reproduces section 21 (*b*) of the English statute, the Housing of the Working Classes Act, 1890, and which may receive ample meaning without recourse to the unlikely hypothesis that so important a change in the Acquisition Act was intended to be made by way of indirect and somewhat far—fetched inference. In my opinion, therefore, it would be enough to say that the decision in the *Collector of Belgaum's* case[1] is fatal to the contention that the land here should be valued on the footing of assessing the separate interets.

But as I am anxious to avoid any appearance of treating unceremoniously the careful and elaborate argument we have had from Mr. Lowndes, I will notice briefly the main points which he has discussed. His chief reliance was placed upon certain particular sections of the Land Acquisition Act, such as sections 3 (g) (iv), 9 (3) and 31 (1) (2) (3) and (4) as showing that the word "land" was used in the Act as equivalent to "interest in land." The Advocate General, on the other hand, has pointed to a number of other sections where the word "land" appears to denote the physical object. It would be tedious to analyse all these sections individually, nor do I think it necessary to do so. There can be no doubt that the word "compensation" is occasionally used to mean the particular sum awarded for the acquisition of a particular interest, but that is quite consistent with the position taken by the Advocate General. Reading the Act as a whole, I can come to no other conclusion than that it contemplates the award of compensation in this way: first you ascertain the market value of the land on the footing that all separate interests combine to sell; and then you apportion or distribute that sum among the various persons found to be interested: sections 3, 11, 18, 19, 20 and especially sections 29 and 30 are to my mind decisive upon the point. Section 31 (3) which Mr. Lowndes claims in his favour appears to me to tell the other way, for, though the sub-section is not perhaps worded with

(1) (1908) 10 Bom. L. R. 657.

perfect accuracy, we have the antithesis marked between land and an interest in land. That distinction is, as I understand it, preserved throughout the Act, where "land" is always used to denote the physical object, which is after all the thing that has to be acquired. Provision is made for compensation to all persons interested, but claims on this head are, I think, to be adjusted in the apportionment prescribed under sections 29 and 30, and do not fall to be considered till after the Court has determined the market value of the land under section 23 (1).

Then Mr. Lowndes urged that the theory which I am endeavouring to justify would lead to unwelcome results in its practical application, and he gave us two or three instances of such difficulty. I have considered those instances to the best of my ability, but am not prepared to concede that the difficulties suggested are inevitable under my view of the Act, and in any case, if that view is right, the argument is no more than an argument *ab inconvenienti*, and the answer would be that our Act is less convenient than would be an Act prescribing valuation by separate interests. I must not of course be taken to express an opinion that an Act drawn so as to impose as a first step the valuation of separate interests would in fact be a better or more convenient statute than that which we have: my opinion goes no further than that that is not the meaning of the Land Acquisition Act.

As to the argument that under the English Acts dealing with similar subjects it is the established practice to value separate interests, I can only say that the English Acts in their scheme and structure differ so materially from the Land Acquisition Act that in my opinion it would be unsafe to make any inference from the practice prevailing in England. I repeat that I by no means assert that the difference in procedure must necessarily lead to any substantial difference in the result; I limit myself to saying that in my judgment the method contemplated by the Land Acquisition Act is that of ascertaining first the market value of the land as if all separate interests combined and then of apportioning that value among the persons interested. It is said that that method may on occasion prove downright impra-

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ticable or unfair, but it will be time to consider such a case when it actually arises.

Then comes the question; does this view of the methods of the Act decide the appeal in the respondent's favour? In my opinion it does not. For, though the market value of the land has to be ascertained on the assumption that all separate interests combine, that, I think, only means that the separate interests are taken to combine so as to give a complete title to the assumed purchaser and the acquiring body, not so as to impress upon the land a character which it did not bear or to give to it a value which it never had in the market; for it is still the "*market* value of *the* land" which has to be determined; and by that is meant, I think, the price which would be obtainable in the market for that concrete parcel of land with its particular advantages and its particular drawbacks, both advantages and drawbacks being estimated rather with reference to commercial value than with reference to any abstract legal rights. If that is correct, it furnishes an answer to the contention that the full quarriable value must be allowed because this land is in fact by natural formation a quarry. That may be so; but it was never a marketable quarry at the material time, and did not become so till after the Collector had made his award. At the material time the claimant could not have obtained a quarry price for the land in the market because admittedly the permanent building leases, containing no provision for re-entry, stood between him and any immediate ability to quarry; and the determining factor is the value to the owner, not the value to the acquiring body after acquirement. The case, therefore, seems to me to fall within the principles which have been applied in English cases to owners of land adaptable for use in reservior sites, and to use the language of Vaughan Williams L. J., in a recent case of that sort, *In re Lucas and Chesterfield Gas and Water Board*[1], I would say that the land here had an adaptability value on the footing of its possibility as a quarry, but that it was not a realised possibility, nor was it competent to the claimant to convert it into a realised possibility by the expedient of buying out the permanent tenants

(1) [1909] 1 K. B. 16.

after the Collector's award had been made; see sections 49 (2) and 50 of the Improvement Act.

If I am right in thinking that that is the law, there is an end of the matter; but since the point was taken, I may add that in my judgment there is really no particular hardship in this view. For it was the claimant himself who, in pursuance of his own financial interests, sacrificed and abandoned the quarry user of the land for the consideration of the rents obtainable from the permanent tenants; in other words, he himself put it out of his power to use the land as a quarry and he did so with his eyes open and for what he regarded as sufficient consideration. I do not think that he has any fair grievance if when the land comes to be acquired, it is acquired in the character in which alone he had the power of using it.

The most that he can fairly claim, in my opinion, is the market value of the land in that character plus a special allowance for its adaptability as a quarry at some future date; and to that I think he is entitled. There is no evidence as to the amount at which this special allowance should be calculated. The Tribunal recognising that the full quarriable value might not be sustained in appeal, give us an alternative finding that as allowance for the special adaptability value the number of years' purchase adopted by the Collector should be increased from $14\frac{2}{7}$ to 18·18. The correctness of this mothod was at first challenged by Mr. Lowndes and defended by the Advocate General, but subsequently Mr. Lowndes informed us that he would not dispute it, as his clients were more interested in getting this Court's decision on the questions of principle than in cutting down the allowance suggested by the Tribunal.

The result is that if I am right as to way in which this land should be valued, there is now no dispute as to the quantum of compensation. In these circumstances and having regard to the special knowledge and experience possessed by the Tribunal on such points, we must adopt the alternative finding, that is to say, the market value of the land will be determined on the valuation made by the Collector subject to this modification that the number of years' purchase will be increased from $14\frac{2}{7}$ to 18·18 years as allowance for the special adaptability value.

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In the circumstances of the case we make no order as to costs.

HEATON, J.—I agree in the order proposed.

The Tribunal have given two valuations: That which they prefer is arrived at by computing the market-value of the land as a whole. But the computation is vitiated because they have taken the quarrying value of the land as realized and not as latent. They have, in short, given to the owners what they consider the land is worth to the acquirer after acquisition, not what they estimate, it would have fetched in the market at the date of the acquisition. Because there is this defect in the computation, I agree with my learned colleague, that the valuation cannot be accepted.

The second and alternative valuation was arrived at by taking each plot separately and allowing some extra value in consideration of the chance of acquiring the adjoining plots so as in the end to get a large quarriable area. How precisely this was done is not explained in detail. The Honourable the Advocate General on behalf of the claimants did not attack that valuation in particular; his argument was that the other valuation must be accepted. Mr. Lowndes for the Improvement Trust withdrew the objections to the alternative valuation which at one time he urged. That being so it seems to me we must accept the alternative valuation.

On the general question, which was most strenuously argued, it is necessary to say a few words.

Mr. Lowndes for the Appellant argued that the correct method of ascertaining compensation for land taken up is to value separately each interest in it. The Honourable the Advocate General for the respondent argued that the correct method is to value the land as a whole and then to apportion to each person interested the share to which he is entitled. Both appealed to the provisions of the Land Acquisition Act in support of their arguments; and we have had those provisions carefully read and commented on. Taking the scope of the Land Acquisition Act and its words and giving them the best consideration I can, it seems to me that neither method is excluded and that what is intended is a fair and reasonable estimate of the compensation to be

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awarded and that this is to be arrived at by taking into consideration certain specified matters and excluding from consideration others. The Act seems to me to leave a great deal to the discretion of the Collector and the Court, and amongst other matters, to leave it to their discretion to ascertain the market value of the land either by the method advocated by Mr. Lowndes or by that which receives the support of the Honourable the Advocate General. I do not think this opinion conflicts with what was decided in *Bhimrao's* case[1]; for in that case it was not held that valuation by computing different interests separately was universally wrong, but that it was correct to follow the other method in that case. But Mr. Lowndes argues that even if the Land Acquisition Act leaves the question open yet section 49 cl. (2) of the Bombay Improvement Act, which Act incorporates certain portions of the Land Acquisition Act, absolutely requires that the compensation must be ascertained by valuing separately the separate interests. The argument does not convince me. I think the Bombay Improvement Act leaves the choice of method open, just as the Land Acquisition Act does. The latter part of clause 2 of section 49, no doubt does contemplate the valuation of a separate interest and when a case such as is contemplated there actually arises—it has not arisen before us—no doubt such valuation as is required will be made.

R. R.

(1) (1908) 10 Bom. L. R. 757.

APPELLATE CIVIL.

Before the Honourable Mr. Justice Chandavarkar, Acting Chief Justice, and Mr. Justice Heaton.

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JIVANJI JAMSHEDJI LAKDAVALA (ORIGINAL DEFENDANT), APPELLANT, *v.* BARJORJI NASSERVANJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Appointment of a Committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by Committee against a trespasser in ejectment—Title.

The Parsi Panchayat at Bombay appointed a committee to manage the property of the Parsi Anjuman at Surat. The committee managed the property

* Second Appeal No. 121 of 1908.

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for a very long time—sixty years—with the authority and acquiescence of the Parsi Anjuman. Subsequently the defendant having trespassed on the property, the committee sued him in ejectment. The defendant contended that the plaintiffs had no right to sue for the recovery of the property as they were neither the owners nor the nominees of the Anjuman.

Held, that the plaintiffs being in possession for a long time with the authority and acquiescence of the owners, namely, the Parsi Anjuman at Surat, were entitled to recover possession from a trespasser.

SECOND appeal from the decision of W. Baker, Acting District Judge of Surat, reversing the decree of G. M. Kharkar, Additional Subordinate Judge of Surat.

The land in suit known as the Lál Agiari and situate in the City of Surat was formerly occupied by an Agiari (a Parsi temple). The Agiari was burnt down in the great fire of 1837 and since then the land remained waste. The land formed part of the property of the Parsi Anjuman at Surat. In the year 1846 certain property of the Anjuman was entrusted to a committee for management and the committee managed the property in suit at least since 1871 and continued to do so till about the year 1904 when the defendant trespassed on the land. The plaintiffs who were the representatives of the committee of management, thereupon, brought the present suit to eject the defendant from the land.

The defendant contended *inter alia* that the land in dispute was not the property of the Parsi Anjuman, that the plaintiffs were not the managers of the property and had never been in possession, that the property was the ancestral property of the defendant and had been in his possession as such. He further contended that the suit was not maintainable inasmuch as the procedure laid down in section 30 of the Civil Procedure Code (Act XIV of 1882) was not followed.

The Subordinate Judge found that the plaintiffs were the managers of some of the properties of the Parsi Anjuman at Surat, their appointment as managers being made by the trustees at Bombay and not by the Parsi Anjuman at Surat and that the suit was not maintainable for non-compliance with the procedure laid down in section 30 of the Civil Procedure Code (Act XIV of 1882). He, therefore, dismissed the suit.

On appeal by the plaintiffs the District Judge found *inter alia* that the suit was not barred by section 30 of the Civil Procedure Code (Act XIV of 1882), that the land in suit belonged to the Parsi Anjuman and was under the management of the plaintiffs and that the land did not belong to the defendant and he had encroached upon it. The District Judge, therefore, reversed the decree and allowed the claim. The following are extracts from his judgment:—

I may point out that they (managers) do not render accounts to the trustees, but the trustees render accounts to them, and that they have absolute discretion as to the manner in which the income is to be spent: provided of course it is spent on charitable objects. It might therefore be argued that their position is not that of ordinary agents. But apart from this there is evidence that though they have not been formally appointed managers by the Anjuman, which apparently never meets, there is evidence that they are in possession and management of a considerable portion of the Anjuman property, and that they are regarded as representatives of the community of Parsis at Surat. Further, it is to be noted that all their management is quite open and that their accounts are printed and published yearly, (there are about 50 volumes of accounts on the record of this case), and that the Parsi Community have acquiesced in this management. Now after 60 years the authority of the managers is challenged and though the actual property in dispute is not very valuable or important, the decision of this case will have far reaching effect on the whole question of the manager's position, which is the reason why the present case is so hotly contested.

* * * * * *

The fact that they are agents for the trustees in Bombay for the distribution of certain funds has nothing to do with this. I have already pointed out that these properties are not under the management of the Bombay trustees and that they could not appoint the managers their agents for the management of them. The plaintiffs are not suing as agents of the Bombay trustees but as persons who with the tacit acquiescence of the Anjuman have managed the bulk of the Anjuman property for 60 years. I am of opinion that section 20, Civil Procedure Code, does not apply to a case like the present, which is analogous to the case of the trustees of a Hindu temple and Mahomedan mosque suing to recover property belonging to the temple or mosque. It may be that the plaintiffs were never formally appointed by the Anjuman, but they and their predecessors (and the succession has been regularly kept up) have acted as managers of the Anjuman property for 60 years. It is now too late to question the validity of their acts.

The defendant preferred a second appeal.

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JIVANJI JAMSHEDJI v. BARJORJI NASSERVANJI.

L. A. Shah for the appellant (defendant).

Robertson and *H. C. Coyaji* with *N. K. Koyaji* for the respondents (plaintiffs).

CHANDAVARKAR, Ag. C. J.—The respondents brought this suit to recover possession of the lands in dispute from the appellant alleging that from time to time a Committee of Managers had been appointed at Surat for the purpose of managing the properties of the Parsi Anjuman of that place; that the respondents were the present Committee, the first respondent being Chairman thereof; that the lands in dispute belonged to the Parsi Anjuman and had been in the management and possession of the respondents. They sought to recover possession in the capacity of managers. They also alleged that the appellant was a mere trespasser and was therefore liable to be ejected.

The first issue in the Court of first instance was:—"Whether the plaintiffs are the managers of the property of the Parsi Anjuman of Surat." The appellant applied to the Subordinate Judge that that issue might be modified by adding to it the words "appointed by the Parsi Anjuman." The Subordinate Judge thought it was unnecessary to allow the amendment, because, in his opinion, the words proposed to be added were mere surplusage.

It is common ground that the appointment of the respondents as a Committee was not by the Parsi Anjuman. The finding of the District Judge is also to that effect. He finds that they and before them their predecessors forming the Committee, of which the respondents are members, were appointed by the Parsi Panchayat in Bombay to administer certain trusts and the appointments had nothing to do with the Parsi Anjuman of Surat. Basing his argument on this finding of fact, Mr. Shah for the appellant contends that the respondents have no right to sue for recovery of the lands in dispute since these admittedly belong to the Anjuman and the respondents are not the Anjuman's nominees. But the District Judge has also found on the evidence that with the acquiescence of the Parsi Anjuman of Surat the respondents have been managing certain properties including the property in dispute, having received them in the year 1846 from one

Bhikhaijee who till then had held them under and with the authority of the Parsi Anjuman.

Now upon those facts found by the learned District Judge it is quite clear that the respondents are entitled to succeed. Though they are not the owners of the property and though they were not appointed Board of Managers for the purpose of holding this property by the Parsi Anjuman, yet, for sixty years they have managed the property with the authority and acquiescence of the Parsi Anjuman. Therefore the case falls within the principle enunciated by the late Chief Justice of this Court in *Navroji Manekji Wadia* v. *Dastur Kharsedji Mancherji* [1].

In that case a similar objection to the title of plaintiff there was raised, but it was disallowed on the following ground: "Even if there be difficulty or doubt as to its ownership, it is obvious that there must be some one entitled to protect from improper invasion that, which for brevity, we will call the temple property, and it appears to us that those who can predicate of themselves that they have exercised the management, authority and supervision alleged in the plaint are so entitled." In the present case the management, authority and supervision of the property have been vested in the respondents since 1846 and that with the knowledge, consent and acquiescence of those who are admitted to be the owners of this property, namely, the Parsi Anjuman.

For these reasons the District Judge was right in the conclusions at which he arrived and his decree must be confirmed with costs.

HEATON, J.:—I also have no doubt that the District Judge who has written a very careful judgment is right in his conclusions.

The plaintiffs seek to recover possession from a trespasser. The trespasser seeks to retain possession on the ground that the plaintiffs are not entitled to sue for possession, because, they were not the owners. But it is established in the case that the plaintiffs have actually been in possession for a long period of

(1) (1903) 28 Bom. 20 at p. 50.

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years, I think, more than 30 years, with the tacit acquiescence of the true owners. If that is not a sufficient title on which to sue a trespasser for possession, it is very difficult to say what is; at least in the case of any claim to possession by any person not an absolute owner.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

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June 21.

MAHADEV NARAYAN LOKHANDE (ORIGINAL PLAINTIFF), APPELLANT, *v.* VINAYAK GANGADHAR PURANDHARE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2—Agriculturist—A person who is an agriculturist in 1871 but is not one when the suit is brought in 1905 cannot claim the benefit of the Act.

In 1871, the defendant executed a mortgage in plaintiff's favour. It was provided that the mortgage was not to be redeemed before 1886. The defendant was an agriculturist at the date of the mortgage: but he was not one when the suit was brought. In 1879, the term 'agriculturist' first received a legal definition in the Dekkhan Agriculturists' Relief Act. In the suit by the plaintiff upon the mortgage the defendant claimed the benefits of the Act, on the ground that his liability under the mortgage was not incurred till 1886: it was admitted that the defendant was not an agriculturist at the date of the suit:—

Held, that the liability incurred by the defendant was to pay back the money borrowed by him; and that liability was incurred when the money was borrowed in 1871.

Held, further, that in 1871, the defendant, whatever may have been his occupation in fact, could not have been an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which was enacted in 1879.

Held, also, that the defendant was not entitled to the benefit of the Act.

SECOND appeal from the decision of Ruttonji Muncherji, First Class Subordinate Judge, A. P., at Poona, confirming the decree passed by T. N. Sanjana, Subordinate Judge of Haveli.

* Second Appeal No. 891 of 1907.

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On the 6th December 1871 the defendant No. 1 executed a mortgage-deed in favour of plaintiff. The mortgage was not to be redeemed before 1886.

In 1905, the plaintiff brought this suit to foreclose the mortgage.

The defendant No. 1 was an agriculturist in 1871 and 1886, but he was not one in 1905.

The Dekkhan Agriculturists' Relief Act, which contained the definition of 'Agriculturist' was first enacted in 1879.

The defendant No. 1 contending that he was an agriculturist at the date of the bond sued upon and at the date when he incurred liability under it in 1886, claimed the benefit of the Dekkhan Agriculturists' Relief Act, 1879.

The Subordinate Judge who tried the case held that the defendant was an agriculturist: and in decreeing the plaintiff's claim against him, made the decretal amount payable in instalments under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Subordinate Judge remarked as follows:—

The chief contention in this case is as regards the status of the defendants Nos. 1, 3, 4 and 5. Admittedly they were not agriculturists on the date of the suit. It is contended that the defendant No. 1 was an agriculturist on the date of the bond sued upon.

There is no other evidence adduced to prove this excepting the statement of defendant No. 1. But I see no reason to doubt his statement. He states that at the time he maintained himself out of the agricultural income of his lands and followed no other occupation. The plaintiff does not seem to deny this. But the learned pleader for the plaintiff contends that the words "an agriculturist within the meaning of that word as then defined by law" in rule 2nd of section 2 of the Dekkhan Agriculturists' Relief Act show that the persons claiming the status of an agriculturist after the passing of the original Act are only included in the term and not those claiming that status before the Act was passed.

The definition of the term is inclusive and not exclusive. The words "shall include a person in the 2nd rule" show that the intention was to apply the Act as well to persons who were agriculturists when the liability in the suit was incurred as to those who are so when the suit is instituted, *Banu* v. *Krishnambhat*, *P. J.*, 1886, page 159. The above rule 2 lays down that in the former case, *i. e.*, in the case of a person who claims to be an agriculturist when the liability was incurred his status should be determined in case the liability

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was incurred after the passing of the original Act according to the definition of the term at the particular time. But it does not exclude the case of a person who claims to be an agriculturist before the original Act was passed when the liability as in this case was incurred before 1879. The defendant No. 1 was an agriculturist when the liability was incurred as he earned his livelihood at the time wholly by agriculture and I find that he is entitled to the benefit of the provisions of the Dekkhan Agriculturists' Relief Act.

On appeal, this decree was confirmed by the First Class Subordinate Judge with appellate powers on the following grounds :—

No exception is taken to the correctness of the decree passed by the Court below provided defendant No. 1 (respondent) be found an agriculturist on the date the mortgage-bond was executed or on the date the liability was incurred. Mr. *Lokhande* for the appellant founds his argument upon explanation (2) section 2 of the Dekkhan Agriculturists' Relief Act of 1879. It says that "the term agriculturist.....should include a person, who when..... the liability was incurred was an agriculturist within the meaning of that word as then defined by law." Now what do the words "when the liability was incurred" mean, and much depends upon the way in which they are construed. The words are no doubt not happily chosen. At first sight they may mean that the liability was incurred on the day the mortgage-bond was executed. If so, there was then no enactment in force of the nature of the Dekkhan Agriculturists' Relief Act, and there was no law, in which the word "agriculturist" was defined. If this construction be placed on the said words a *bonâ fide* agriculturist would be debarred from the benefit of the Dekkhan Agriculturists' Relief Act in respect of any bond or mortgage or any other writing executed prior to 1879 when the Dekkhan Agriculturists' Relief Act came into force. To construe these words we must look to the object, and scope of the enactment. The very title by which it is distinguished shows that the Act was passed to relieve the indebtedness existing among the agricultural population prior to 1879. The said words should therefore mean when the liability becomes due, or in other words when the right to sue occurs. This happened in 1886. The definition of the word "agriculturist" has undergone several amendments since the passing of the Act in 1879. Even according to the old definition defendant No. 1 was an agriculturist both when the bond was passed and the liability was incurred, for it is not disputed that he was then earning his livelihood wholly and principally by agriculture.

The plaintiff appealed to the High Court.

V. G. Ajinkya for the appellant:—Admittedly the defendant No. 1 was not an agriculturist in 1905 when this suit was brought. The question then is was he an agriculturist within the meaning

of the Dekkhan Agriculturists' Relief Act, 1879, when the liability was incurred? Here the liability was incurred in 1871, when the mortgage-deed was executed, but when there was not enactment defining the term "agriculturist."

The lower Courts have erred in holding that the liability was incurred in 1886, at that date the debt became payable; the liability was incurred in 1871.

P. P. Khare for respondent No. 1 (defendant No. 1):—The Dekkhan Agriculturists' Relief Act, 1879, was introduced for the first time in 1879 with a view to relieve the then indebtedness as well as the future indebtedness of agriculturists. As the debt in the present case was contracted in 1871 and remained unpaid until after the passing of the Dekkhan Agriculturists' Relief Act, the case of defendant No. 1 is one of indebtedness contemplated to be relieved against by the introduction of the Act in 1879.

As to the debt in question here, the liability to pay was incurred in 1886, when it became payable or due till that date the mortgagor did not become liable to pay the debt though the deed sued upon was passed in 1871.

P. D. Bhide for respondent No. 2.

BATCHELOR, J.—This appeal arises out of a suit filed by the mortgagee to recover the mortgage-debt with costs and further interest by sale of the mortgaged property. The first defendant replied that he was an agriculturist and claimed the benefits of the Dekkhan Agriculturists' Relief Act. The lower Courts have allowed the first defendant the benefits of the Act, and the question involved in this appeal is whether he is entitled to them in this case. The particular shape which they have assumed is the form of instalments which have been granted at the rate of Rs. 150 a year. Whether the first defendant is an agriculturist or not turns upon the construction of sub-section (2) of clause (*b*) of section 2 of the Dekkhan Agriculturists' Relief Act. It is there provided that the term "agriculturist" when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the

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meaning of that word as then defined by law. The mortgage-bond in suit here was executed in 1871, and under the mortgage it was provided that the mortgagor should not redeem before 1886. It is contended before us that the first defendant's liability was not incurred till 1886, inasmuch as it was not till then that repayment of the debt became obligatory, and that we understand is the view adopted by the learned Judge below. But it does not appear to be possible to put that construction fairly upon the words of the section. What was the liability incurred here? The liability incurred was to pay back the money borrowed by the mortgagor, and it is clear that that liability was incurred when the money was borrowed in 1871. That is not the less so by reason of the stipulation that the payment was not due till 1886. The liability to repay in 1886 was incurred in 1871.

As to the other argument which was addressed to us, it is enough to say that since this liability was incurred in 1871, and since the Act of 1879 contained the first legal definition of the word "agriculturist" it follows that, when he made this mortgage, the first defendant, whatever may have been his occupation in fact, could not have been "an agriculturist within the meaning of that word as then defined by law", for there was then no such legal definition existing.

The result is that the first defendant is not entitled to the benefit of the Dekkhan Agriculturists' Relief Act. This appeal must be allowed and there must be the ordinary decree for sale under section 88 of the Transfer of Property Act in the form prescribed by the Civil Procedure Code.

The mortgagee will be entitled to add the costs of this appeal to his mortgage-debt.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar and Mr. Justice Beaman.

SIR DINSHA MANEKJI PETIT, BART., AND OTHERS, PLAINTIFFS, *v.* SIR JAMSETJI JIJIBHAI, BART., AND OTHERS, DEFENDANTS.* 1908. *November* 28.

The Trustees and Mortgagees Powers Act (XXVIII of 1866), section 34—Non-applicability to Charitable Trusts—Indian Trusts Act (II of 1882), sections 1, 2—Statute of Frauds (29 Ch. ii, C. 3), section 7—Civil Procedure Code (Act XIV of 1882), section 539—Religious or Charitable Trusts—"Further or other relief", meaning of—Parsis—Conversion among Indian Zoroastrians—Juddins—Convert not entitled to certain religious and charitable institutions of Parsis.

The Trustees and Mortgagees Powers Act (XXVIII of 1866) does not apply to Charitable Trusts. Section 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst other sections section 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events section 34 has ceased to have any force. The saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity. Section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act. Section 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time; even if it did the Indian Evidence Act entirely superseded it.

Held by DAVAR, *J.*:—Section 539 of the Civil Procedure Code, 1882, is very limited in its scope and operation. It contemplates the institution of a suit to "obtain a decree" for reliefs which are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of the section, for the plaintiffs have obtained a decree under three of the five provisions of the section, *viz.* (*a*) the appointment of new trustees, (*b*) vesting trust property in the trustees, and (*c*) settling a scheme. But the reliefs asked for in the second branch of the case, namely, the ascertainment and declaration of what are the trusts, the rectification of the trust deeds, a declaration that the defendants have either wrongly declared the trust in the deeds or wongly interpreted the trusts therein, do not fall under any of the five heads mentioned in the section. The words "further or other relief" that follow must necessarily be construed to refer to reliefs *ejusdem generis* and not to reliefs wholly outside those specifically defined under these five heads.

A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within section 539 of the Civil Procedure Code, 1882.

* Suit No. 689 of 1906.

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Section 539 contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest" that is threatened or infringed.

A well-established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community.

Peshotam Hormasji Dustoor v. *Meherbai*(1); and *Bai Shirinbai* v. *Kharshedji*(2) followed.

Although the conversions of Juddins is permissible amongst Zoroastrians, such conversions are entirely unknown to the Zoroastrian community in India; and far from being customary or usual for it to convert a Juddin, the Zoroastrian Community of India has never attempted, encouraged, or permitted the conversion of Juddins to Zoroastrianism.

Even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefits of the funds and institutions under the defendants' management and control; these were founded and endowed only for the members of the Parsi community; and the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranis from Persia professing the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

Held by BEAMAN, J.:—The decision of a suit under section 539 of the Civil Procedure Code, 1882, is not only binding on the parties to it, but to all persons affected by it.

The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, *e. g.*, removing fraudulent trustees, restraining a breach of trust, and so forth.

Any extension or limitation of the scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust.

The Zoroastrian religion does admit and enjoin conversion. The Indian Zoroastrians while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular

(1) (1888) 13 Bom. 302. (2) (1896) 22 Bom. 430.

language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organisation.

Conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time.

It was not the intention of the founders of the trusts in question to extend their benefits to any one who was not in the most rigid caste sense Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father.

THE plaintiffs, as members of a body known as the Zoroastrian or Zarthosti or Mazdiyasnan Anjuman which includes all Parsis in Bombay professing the Zoroastrian (otherwise called the Mazdayashni) religion, brought this suit under section 539 of the Civil Procedure Code (Act XIV of 1882) against the defendants who were Trustees of the Funds and immoveable properties of the Parsi Panchayat.

In their plaint the plaintiffs alleged that there were numerous rich endowments consisting of property both moveable and immoveable devoted to various charities and religious purposes for the benefit of persons professing the Zoroastrian religion. These properties were in the possession and control of the defendants who claimed to be Trustees of such properties by virtue of divers deeds of appointment executed under powers of appointment purporting to be created or conferred by a Deed of Trust dated the 4th of December 1851 and by a Deed of Trust dated 25th September 1884.

They contended that the said powers were altogether invalid, that the powers of appointment of Trustees of all the said properties had always been vested in the general body of Zoroastrians in Bombay, that the defendants, against whom no charges of misconduct were made, were not validly appointed trustees of any of the said properties and they claimed that

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trustees thereof should be appointed under a scheme framed by the Court.

The plaintiffs said that amongst the said immoveable properties were five Dokhmas or Towers popularly known as the Towers of Silence situate on Malabár Hill, Bombay, with certain other buildings connected therewith known as Sagdis, and also a Nasakhana or corpse-bearers' house situate at Agiari Mohalla, Baharkote, outside the Fort of Bombay. These properties were, the plaintiffs claimed, built for the use and benefit of all persons professing the Zoroastrian faith including converts to that faith. They further contended that the trust deed of the 25th September 1884 purported to declare the trusts in terms at variance with the trusts and purposes for and to which the same were originally provided and dedicated, the said properties being declared by the said deeds (according to the defendants' recent construction thereof) to be held for the use only of persons being Parsis by descent and also professing the Zoroastrian religion, whereas the plaintiffs believed that at the time the said deed was prepared and executed there was no intention to exclude from the benefit of the said trusts any person professing the Zoroastrian faith.

The plaintiffs prayed (*a*) for a declaration that the defendants were not validly appointed trustees of either the moveable or immoveable properties referred to and that the powers of appointment of new trustees purporting to be created or conferred by the two deeds of trusts of the 4th of December 1851 and the 25th of September 1884 were void and of no effect; (*b*) for a declaration that the power of appointment of new trustees of all the said properties had always been vested in the general body or Zoroastrians in Bombay and that the same should be exercised in accordance with such scheme as the Court might approve of; (*c*) for a declaration that the declarations of trust contained in the trust deed of the 25th September 1884 of or in respect of three of the Dokhmas and the Sagdis and the Nasakhana referred to above were *ultra vires* and void in so far as they differ from the original trusts thereof; (*d*) that the trusts upon which the said properties were held might be ascertained and declared.

In their written statement the defendants stated that until the year 1903 there was no case known to the Parsi community of a person whose father was not of the Zoroastrian religion claiming to be a convert to the Zoroastrian religion. In 1903 the wife of the 6th plaintiff a French lady was invested with the sacred shirt and thread and claimed to be a convert to the Zoroastrian religion. The defendants declared that this suit was brought by the plaintiffs for the purpose of claiming for the said French lady rights in the properties mentioned in the plaint which she was not entitled to and they submitted that the plaintiffs were not entitled to maintain this suit in the interests of a person who was not a party to this suit. Further the defendants denied that they were not validly appointed trustees of either the moveable or immoveable properties and they denied that the power of appointment of new Trustees created or conferred by the two deeds of trusts of the 4th December 1851 and 25th September 1884 were void and of no effect. They denied that the powers of appointment of new Trustees of all the properties had always been vested in the general body of Zoroastrians in Bombay; that the declarations of trust contained in the deed of the 25th September 1884 of or in respect of the Dokhmas and Sagdis and the Nasakhana mentioned in the plaint were *ultra vires* and void as alleged and that the said declarations of trust differed from the original trusts thereof. They contended that it was quite unnecessary to frame any scheme for the administration of the properties as the whole Parsi community including the plaintiffs were well satisfied with the management by the defendants of the charitable properties of which the defendants were the trustees.

Further the defendants contended that whenever the terms "Zoroastrians," "Mazdiyasnan," "Zarthosti Anjuman," "Zoroastrian Anjuman" or other similar terms have been used by persons founding or endowing or wishing to found or endow any trust for the religous and charitable purposes referred to in the plaint, the intention of the founder or endower using such terms was to found or endow such trust for members of the Parsi community professing the Zoroastrian religion and not for persons converted to the Zoroastrian religion

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who were not in the contemplation of such founder or endower; that the Parsi community had always been regarded as consisting of (1) the descendants of the original emigrants from Persia into India at the time of the persecution by the Mahomedan Conquerors of Persia of the followers of the Zoroastrian religion who profess the Zoroastrian religion; (2) the descendants of the Zoroastrian in Persia who were not amongst the original emigrants but who are of the same stock and have since that date from time to time come to India and have settled here either permanently or temporarily and who profess the Zoroastrian religion; and (3) of children of a Parsi father by an alien mother who profess the Zoroastrian religion; that no one is entitled to the benefit of the trusts of which the defendants were the trustees except members of the Parsi community as defined under the three heads above mentioned.

At the trial 36 issues were raised and a great many points were discussed but the two main questions in the case were :—

(1) Whether the defendants are validly appointed Trustees of the properties and funds of the Parsi Panchayet, and whether, in the event of death or resignation of one or more of them they have the right of filling up such vacancy or vacancies as they occur.

(2) Whether a person born in another faith and subsequently converted to Zoroastrianism and admitted into that religion is entitled to the benefit of the religious Institutions and Funds mentioned in the plaint and now in the possession and under the management of the defendants.

Lowndes with *Scott*, Advocate-General, *Padshah*, *F. S. Talyarkhan* and *F. P. Talyarkhan* for the plaintiffs.

There are really two main points in issue: (1) What are the trusts and who are entitled to the benefits of them? (2) Are the defendants validly appointed Trustees? We charge no misconduct in the general sense against the defendants. We only charge them with legal misconduct. They are biassed and do not represent the whole community.

We say that the trusts are held for the benefit of all Zoroastrians who claim them. The sole test is the following of the

Zoroastrian religion. According to the defendants they have absolutely unlimited discretion to admit or not a person to the benefit of the Trusts.

Strangman with him *Inverarity*, *Raikes* and *Kanga* for the defendants.

The plaintiffs cannot maintain the suit as framed. No right of theirs is attacked. They are fighting for persons who are not before the Court. The decree in this suit will not bind those who are not parties to it.

Lowndes in reply.

DAVAR, J.—[His Lordship after setting out the facts of the case went at great length into the history of the various trusts, and continued :—]

It was contended that, whatever may be the position of the defendants with regard to Funds and Properties that came into existence prior to 1866, their position as Trustees was "unassailable" with regard to all Funds and Properties that came into existence and in the possession of their predecessors after the 24th of October, 1866, on which date the Trustees and Mortgagees Powers Act, being Act XXVIII of 1866, came into force, and reliance was placed on section 34 of that Act.

This contention is certainly one that requires very careful consideration, and we have most anxiously considered the arguments addressed to us on this head by Counsel on both sides.

Section 34 of this Act gives power to Trustees, under certain circumstances, to appoint other persons as their co-trustees in the place of a Trustee dying, resigning, leaving British India for more than six months, or becoming unfit or incapable to act as Trustee. The first question with reference to this Act that arises for consideration is: Does the Act apply to Charitable Trusts? Although this Act came into operation as far back as 1866, there seems to be no authoritative decision on this point. It must be remembered that the tendency of legislature in India has been, as far as possible, not to disturb by special legislation existing usages and customs of the people of the country and not to interfere with their public, religious, and charitable

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institutions. The considerations that apply to charities in India are wholly different from those that apply to charities in England. The Indian Trusts Act II of 1882 specifically exempts from its operation all public or private, religious or charitable, endowments. No such exemption is specifically made in this Act of 1866, but the wording of the Preamble seems to negative the idea of its applicability to Charitable Trusts.

Then, again, the provisions of this Act are taken verbatim from two English Statutes. The first nineteen sections—sections 32 to 36 and sections 38, 44 and 45—are taken from 23 & 24 Vic. c. 145, known as Lord Cranworth's Act.

Sections 20 to 30, section 31 with the omission of the last clause, and sections 37, 39, 40 to 43 are taken from 22 & 23 Vic. c. 35, known as Lord St. Leonard's Act.

Neither of these Acts, so far as we can see, have ever been held to apply to Charitable Trusts. They find no place in Tudor's Charitable Trusts; and, in answer to Mr. Lowndes' argument, no English case was pointed out to us where these Acts have been held to apply to Charitable Trusts. Mr. Strangman cited *In re Coates to Parsons*(1), but that is a case under the Conveyancing Act and throws no light whatever on the question. It is a remarkable circumstance, as I have observed before, that the question is not covered by any authority. I have never known this question raised in our Courts, and myself and my predecessors in office who sat in Chambers have on several occasions given opinion, advice, or directions to Trustees of Charitable Properties under section 43 of the Act on the assumption that the Act applied to Charitable Trusts as well as to all other Trusts. Now, however, that the question is elaborately argued before us, we have come to the conclusion that the Trustees and Mortgagees Powers Act XXVIII of 1866 does not apply to Charitable Trusts.

Another answer to the defendants' contentions, based on section 34 of the Trustees and Mortgagees Powers Act, is that that section is no longer of any legal force. Section 2 of the Indian Trusts Act II of 1882 expressly repeals, amongst other sections,

(1) (1886) 34 Ch. D. 370.

this section 34 of the Trustees and Mortgagees Powers Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events, section 34 has ceased to have any force. But it is contended that section 1 of the Indian Trusts Act says:—"Nothing herein contained . . . . applies to public or private, religious or Charitable Trusts." Therefore the repealing section does not apply to Charitable Trusts. To hold this would, I think, lead to endless confusion. It would mean that whereas Trustees of private Trusts have no longer the power to appoint their colleagues in substitution or succession to those that retire, die, or become incapable, Trustees of Charitable Trusts would still retain that power,—a conclusion which is obviously undesirable and one which the Legislature could never have intended. We are of opinion that the saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows. The words of the section are unqualified and absolute, and provides that "the Statute and Acts mentioned in the schedule shall be repealed in the territories to which this Act . . . extends." We must therefore hold that section 34 of the Trustees and Mortgagees Powers Act is repealed wholly, and that there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity.

But assuming, for one moment, that the Trustees and Mortgagees Powers Act applies to Charitable Trusts, and also assuming that the repeal of the section does not operate so far as Charitable Trusts are concerned, and that the section is in full force and is applicable to the present case—does it help the defendants? The section, shortly put and omitting the clauses that are not very important, provides as follows:—

"Whenever any trustee, either original or substituted, . . . shall die, etc. . . . it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person . . . then for the surviving and continuing trustee . . . by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, etc. . . ."

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Mr. Strangman argued before us that, so far as the Funds were concerned, the covering letter which accompanied each donation was an "Instrument creating the Trust." When these letters were tendered, plaintiff's Counsel objected to their being admitted as exhibits unless they were properly stamped. In a separate written judgment which the Court delivered on the 6th of April, 1908, we have fully discussed the typical letters tendered, and held that these letters, which were subsequently put in and marked Exhibit No. 84, were not "Instruments creating the Trust," so that *that* clause of the section goes out of consideration. But even if these letters were Instruments creating the Trusts, let us now consider the other clauses of the section and see if they help the defendants' case. Whom did the defendants succeed? Was the person in whose place each one of the defendants was elected either an "original or substituted Trustee"? We have held that the power of appointment conferred on the original five Trustees was bad. Assuming that the original five Trustees were properly appointed Trustees, those that followed them were certainly not Trustees and could not be included in the expression, "Any Trustee, whether original or substituted" Then, again, were those who nominated the present defendants "surviving or continuing Trustees?" Surely not. If the power conferred on the original Trustees by the Deed of 1851 was bad, every subsequent appointment of Trustees was bad and no one that assumed office as Trustee after the original five Trustees could be said to be a Trustee The successors of the original five Trustees—assuming that those five were validly appointed—were appointed by people who had no right to appoint them Trustees, and therefore in the eye of the law they were not Trustees. Not one of the original five Trustees was alive when the present Trustees were appointed.

It was argued that, in some instances, Funds were given to the then Trustees by name. That was on the erroneous assumption that they were validly appointed Trustees and could make no difference as to their real status.

Regarded from every point of view, the contentions of the defendants' Counsel, based on section 34 of the Trustees and Mortgagees Powers Act, appear to us to be wholly untenable.

[His Lordship again dwelt at considerable length on the evidence bearing on the first branch of the case, and stated his conclusion as follows—]

We hold that the defendants are not validly appointed Trustees of any of the Funds enumerated in the three Schedules, Exhibits Nos. 54, 59, and 60.

We also find that they are not validly appointed Trustees of any of the properties comprised in the General Trust Deed of 1884, Exhibit U, except properties 10thly and 11thly described in the Schedule to the Deed.

Having adjudicated on what we consider to be the legal rights of the parties, speaking both for my learned colleague and myself, we feel it our duty here to record that we have been drawn to these conclusions with much regret and great reluctance; and in holding that the defendants are not validly appointed Trustees of the Punchayet Funds and Properties, we should not be taken to cast the smallest reflection on their integrity or honour. The plaintiffs themselves, at the very threshold of the case, in their plaint, have specifically stated that they "make no charge of misconduct against any of the defendants." The very first sentence of my notes of Mr. Lowndes's opening for the plaintiffs is:—"I charge no misconduct in the ordinary sense of the term."

These are the persons whom we are constrained to remove from office, but, in order to show our appreciation of them and their work in the exercise of the jurisdiction we have over public charities and of express authority conferred on this Court by sections 35 and 45 of the Indian Trustees Act, XXVII of 1866, we appoint the surviving defendants Trustees of all the Funds and Properties dedicated or devoted to Parsi charities and known and spoken of as Funds and Properties of the Parsi Punchayet, and we order that all Trust Funds and Properties do vest in them.

Soon after the death of the first defendant, the other defendants have filled up the vacancy amongst them by appointing the first defendant's only son in the place of his father. We think this is very injudicious conduct on the part of the defendants, as their

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act may have tended to embarrass the Court. We find, however, that the choice of the new Trustee is not open to any objection. The present Sir Jamsetji has been, at a public meeting of the Parsi community, unanimously appointed the head or પ્રમુખ of the Parsi community, and is elected to the same position as his father occupied amongst his own people, and we appoint him as one of the Trustees jointly with the surviving defendants, and direct that the Trust Funds and Properties do vest in him jointly with his co-Trustees.

We do this because our findings will necessitate our referring the matter to the Commissioner for the purpose of framing a scheme for the appointment of new Trustees and it must necessarily take a long time to frame and sanction such a scheme. We think, therefore, that it is expedient to appoint Trustees immediately, and that cannot be done under the present circumstances without the assistance of this Court. We also think that these appointments, at all events, should not be for a limited period but must be for life. Till the scheme is framed and comes into operation, the Court will have to fill in any vacancies that may arise in the meanwhile.

Our decree on this part of the case will be to declare that the surviving defendants are not validly appointed Trustees of all the Funds and Properties of the Parsi Punchayet, except properties 10thly and 11thly described in the Trust Deed of 1884, Exhibit U; but that the Court appoints them, together with the present Sir Jamsetji Jijibhoy, Trustees for life of those Funds and Properties and vests all the Trust Funds and Properties in them.

We refer this matter to the Commissioner to frame a scheme for the appointment of a Trustee in the place of any one of the present Trustees dying, resigning, leaving Bombay for a period longer than six months, or more, or becoming incapable of performing his duties. Such scheme, after being framed, should be submitted to the Advocate-General for his approval and then be brought before this Court for final sanction. The Advocate-General will be at liberty to appear and make any suggestion he may desire to make to the Court when the scheme comes up for sanction.

If, instead of it being referred to the Commissioner, either of the parties desire to refer the framing of a scheme to a Committee of Members of the Parsi Community, we give them liberty to apply to us on notice to the other party.

We could, if we choose, include in the scheme the 10thly and 11thly described properties. The case of the *Attorney-General* v. *The Dedham School*(1), is a direct authority enabling the Court to do so. Sir John Romilly, the Master of the Rolls, in that case held that though improper conduct was not even alleged against the Governors, that was a proper case for a scheme for the purpose of putting all the Funds and Properties under "one uniform system of management." We, however, do not desire to interfere in this manner. If the defendants desire it, they may continue to be Trustees of these two properties. We have no doubt, however, that if, in the end, we are held to be right in our conclusions and the order for framing a scheme is put into operation, the defendants will consent to include these properties in the scheme.

I now turn to the consideration of the second branch of this suit; and here I must speak for myself, as my learned brother, who is in entire accord with my conclusions on the first part of the case, may possibly not be in accord with some of the conclusions to which I have arrived on this part of the case.

The question for decision, involved in this branch of the case, is by far the more important of the two main questions in the suit. This question between the plaintiffs and defendants is, as defined in the earlier part of this judgment:—

"Whether a person born in another faith and subsequently converted to Zoroastrianism and admitted into that religion is entitled to the benefit of the Religious Institutions and Funds mentioned in the plaint and now in the possession and under the management of the defendants."

Besides the religious and charitable Institutions under the management and control of the defendants, there are numerous other Institutions in Bombay, such as Atash Behrams, Agiaries, Dare Mehers, Sanitariums, etc., dedicated to the use and for the benefits of the Parsi community, with which the Court is not

(1) (1857) 23 Beav. 350.

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concerned, as they are under the control and management of the donors—their successors or other Trustees. In fact the Court is not concerned even with *all* the Institutions and Funds in the possession and management of the defendants: for the plaintiffs' Counsel, at the hearing, has narrowed down his demands on behalf of the Converts to Zoroastrianism, whose cause the plaintiffs have so warmly espoused in this suit, and confined his contention to the Dockmas, Sagdis, Nasakhanas and the Godavra Agiary, and to only one fund—the one for carrying the dead bodies of *all* Zoroastrians to the Towers of Silence.

The plaintiffs contend that the Zoroastrian religion not only permits but enjoins the conversion of aliens born in another faith, and that the moment an alien is invested with a Sudra and Kusti, after undergoing the Navjot ceremony at the hands of a Parsi priest, he or she is invested with all the rights and privileges of a born Zoroastrian and is entitled to the benefits of all religious and charitable Institutions and Funds that exist for the benefit of the Zoroastrian community. They say the defendants have threatened to exclude such Converts from the benefits of the Funds and Institutions under their control and management, and they have instituted this suit as the champions of such Converts, to obtain from the Court a declaration that such Converts are entitled as of right to participate in the benefits of the religious and charitable Institutions and Funds established for the use of all Zoroastrians.

Although this portion of the suit is *one* of the two main branches of the suit, for all practical purposes, this suit is really a consolidation of two suits. The two branches have nothing whatever in common with each other. The two questions in the suit are wholly distinct and separate from each other. Each branch is a suit by itself. Entirely different considerations apply to each of the two branches. Counsel for both parties have divided their arguments under two distinct heads. There is scarcely an argument or consideration which is common to both branches. The two questions stand apart and are independent of each other. The two branches are practically two separate suits, quite independent of each other; and I propose

to treat the question involved in this branch of the suit as if it had been raised in a suit separate and independent of a suit involving the question of the validity or otherwise of the Trustees' appointment.

In the third and fourth paragraphs of their written statement, the defendants raise a question which, in my opinion, goes to the very root of this part of the plaintiffs' case. In paragraph 3, they question whether the plaintiffs are entitled to maintain the suit in the interests of a person who is not a party to the suit, and in paragraph 4 they say :—

> The plaintiffs do not allege in the plaint that any rights of theirs in any of the properties referred to in their plaint have been denied. The defendants submit that the plaint discloses no cause of action in the plaintiffs.

In other words, the defendants contend that the plaintiffs are not entitled to maintain the suit in respect of the reliefs they pray for in this branch of their case. The questions that arise for consideration on this plea of the defendants are many and varied. Are the plaintiffs, collectively or individually, entitled to the relief or reliefs they claim? Have they or any of them a right of action against the defendants? Have they any cause of action against the parties whom they have brought before the Court? Have they disclosed any such cause of action in their plaint? Have any of their rights been denied, infringed, or threatened to be infringed? Have the defendants been guilty of such acts as would entitle the plaintiffs, jointly or singly, to maintain an action against them? Have they suffered any wrong which calls for a remedy? If they are not entitled in their personal capacity,—individually or separately—to maintain this portion of their suit, does the consent of the Advocate-General to institute this suit—obtained in accordance with the provisions of section 539 of the Civil Procedure Code—make any difference in their position? Are they entitled to the relief or reliefs they claim?

Before entering upon the consideration of these questions, it would be useful to ascertain exactly what is the relief they claim. Shorn of all technicality and divested of all legal phraseology, the plaintiffs ask for nothing more than a bare declara-

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tion that an individual born in an alien faith, but subsequently converted to Zoroastrianism, is entitled to all the benefits of all the religious and charitable Funds and Institutions which exist for the benefit of the Zoroastrian community, and which are under the control and management of the defendants. The prayers on this head are (*c*), (*d*), (*e*), (*f*) and (*h*). At the hearing, however, all that we were asked to do was to ascertain the real Trust on which the Funds and Properties in question were dedicated, to declare such Trust, and, if necessary, to rectify the Trust Deeds of 1851 and 1884 according to the decision of the Court. Are the *plaintiffs* entitled to these reliefs? Are *they* entitled to maintain this suit in pursuit of the reliefs they claim? My answer to these questions is in the negative. The plaintiffs are, every one of them, born of Parsi parents, and born in the religion of their forefathers. They all profess the Zoroastrian religion. They are undoubtedly entitled to enter the Godavara Agiary, and make as much use of it as any other Parsi is entitled to make. They are clearly entitled to participate in every Fund that exists for the benefit of all Zoroastrians, including the Fund for carrying all Zoroastrians to the Towers of Silence. They are entitled, as of right, to have their bodies disposed of in the Towers on their death. Has any one challenged *their* rights? Has any one disputed these privileges? Has any one even remotely or indirectly suggested that *they* are not entitled to those rights? Have the defendants denied to *them* any single one of their rights and privileges? Have the defendants done or said anything which, by any stretch of imagination, may be taken to be an invasion or an infringement of *their* rights? Have *they* a wrong to remedy or a grievance to redress? To all these questions, there is but one answer, and that is an emphatic negative. The word "relief" necessarily implies the pre-existence of a "wrong." To have that wrong redressed in a Court of Law is the privilege of every subject of the Crown. That wrong can be redressed by an action. The right of action is vested in the person that is wronged. An action is a legal proceeding, whereby a person demands his rights, which may be denied or infringed or threatened to be infringed, and claims to have those rights enforced and to have his wrongs re-

dressed. In Lord Halsbury's Laws of England (Vol. 1 page 2) "an action, according to the legal meaning of the term," is defined as "a proceeding by which one party seeks in a Court of Justice to enforce some right against, or to restrain the commission of some wrong by, another party." In the same paragraph, defining an action, it is stated :—

"More concisely it may be said to be 'the legal demand of a right' . . . It implies the existence of parties, of an alleged right, *of an alleged infringement thereof* (either actual or threatened), and of a Court having power to enforce such a right."

In this action, we have the parties, we have their rights, and we have the Court having power to enforce those rights, but where is the infringement, either actual or threatened? It is no use whatever disguising the fact that the plaintiffs have not come before the Court to claim or enforce *their own rights,* redress *their own wrongs,* or remedy *their own grievances.* The fight is not on their own behalf but on behalf of the sixth plaintiff's wife. With this lady is brought in another Rajput lady, of whom we have heard but very little. What the defendants in effect have done is to publicly notify that they will not allow these two ladies to participate in the benefits of the Funds and Institutions under their management. Although the resolutions and notifications in the pleading mentioned are in general terms, and refer to all aliens who may be converted to the Zoroastrian faith, they are undoubtedly aimed at these two ladies, who claim to have been admitted into the Zoroastrian faith. The action of the defendants was taken in obedience to the behests of the whole community, in a public meeting assembled; and such behests, the defendants rightly submit, they were bound to carry out. It is not therefore the rights of any of the plaintiffs that are infringed or threatened. Nobody knows—neither the plaintiffs nor the defendants—whether the Rajput lady desires to go to the Godavara Agiary, or to be carried to the Towers of Silence after death, but we do know that the French lady claims those rights, or rather, to be more accurate, the plaintiffs say she claims them—for I really do not know whether she does so or not. She is not before us as a party; she was not before us as a witness; and even her husband, who is a party to the suit and

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attended the Court during most of the hearings, has not chosen to tell us whether his wife is really desirous of going to the Godavara Agiary, or, in the remote contingency of her dying in this city, of being conveyed to the Towers of Silence.

Are the plaintiffs entitled to carry on a fight on somebody else's behalf when that somebody does not come before the Court—does not ask for redress—does not appeal to the Court for its assistance? She is an entire stranger to this action. She has abstained from seeking the assistance of the Court and the *abstention appears to me to be intentional and deliberate.* Although the defendants have taken this point in their written statement and raised a distinct issue thereon, and although the point was pressed by their Counsel in the course of the hearing, no application was made, either before or even at the hearing, to add the lady as a party plaintiff. Is this Court to go out of its way and render assistance to a party who does not seek such assistance? Are we here to listen to discussions the value of which, as far as this suit is considered, are, in my opinion, purely academic; and exercise our powers in favour of a party or parties who do not ask us to do anything of the kind; and declare and adjudicate upon the rights of people who are not before us—and *that* at the bidding of other people whose rights are not infringed or threatened and who have themselves no wrongs to redress and no grievances to remedy?

"*Actio non datur non damnificato*" is a maxim of law which governs that branch of the law which deals with the rights of subjects to maintain actions at law. "An action is not given to him who is not injured."

The plaintiffs in this case, either collectively or individually, are not in any way injured or damnified by the action of the defendants. The Resolutions and Notifications published by the defendants have not injured the plaintiffs or invaded *their* rights. *They* have no complaint to make on their own behalf. All they say is: "The defendants have announced their determination to deprive converts to Zoroastrianism of certain rights and privileges of participating in Properties and Funds under their management. We are of opinion that their action is unjustifi-

able. We ask the Court to declare that the defendants are guilty of wrongful conduct. They have threatened to infringe the rights of two ladies, and their conduct amounts to an invasion not only on the rights of these two ladies, but of others who may in the future embrace Zoroastrianism." We, sitting here, have not heard that these two ladies claim any such rights as the plaintiffs claim for them in this suit. The plaintiffs know nothing whatever about the Rajput lady; and, as to the French lady, none of the plaintiffs have taken the trouble of telling us that this lady has felt hurt at the action of the defendants, or has expressed a desire to participate in the Charitable Funds and Properties administered by the defendants.

The great mischief of entertaining actions of this kind would be that, besides laying the defendants open to all sorts of action at the instance of people who have no wrongs to remedy and no rights to vindicate, the judgment of the Court would not be binding on those very parties on whose behalf the action is filed. It is quite clear that the rights and remedies of these two ladies would not, in the least, be affected by our judgment in this suit. Assuming that, on the merits, this Court decided adversely to the contentions of the plaintiffs, there is nothing to prevent any one of these two ladies, or both of them, filing suits against the defendants for the ascertainment and declaration of those very rights which we are asked to adjudicate upon in their absence and behind their backs. They would very rightly say: "We were not heard in support of our claim and we are not bound by what the Court did in our absence." The parties supposed to be injured by the action of the defendants have not invoked the assistance of this Court, and I am of opinion that the Court ought not to go out of its way and pronounce its judgment on the rights of people who are not before the Court, at the bidding of people who must be regarded as mere strangers.

It is, however, argued that the plaintiffs having obtained the previous consent of the Advocate-General to the institution of this suit under the provisions of section 539 of the Civil Procedure Code, they, as persons interested in the Trusts created for public religious, and charitable purposes, are entitled to maintain the

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suit, even though they may not have been entitled to maintain the same in their individual or personal capacities. It is contended that the defendants are guilty of breach of trust in the administration of the charities entrusted to them, and that the plaintiffs, as persons interested in the Trusts, are entitled to maintain this suit under section 539 of the Civil Procedure Code.

It seems to me that section 539 is wholly inapplicable to this portion of the suit, and the consent of the Advocate-General makes no difference whatever in the status of the plaintiffs. It is to my mind wholly immaterial whether the consent of the Advocate-General was or was not obtained for the institution of this part of the suit. Section 539 is very limited in its scope and operations. It contemplates the institution of a suit to "obtain a decree" for reliefs that are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of this section, for the plaintiffs have obtained a decree under three of the five provisions of the section, *viz.*, (*a*) the appointment of new trustees, (*b*) vesting Trust Property in the trustees, and (*c*) settling a scheme. It cannot be pretended that the reliefs asked for in this branch of the case—namely, the ascertainment and declaration of what are the trusts, the rectification of the Trust Deeds, a declaration that the defendants have either wrongly declared the trusts in the deeds or wrongly interpreted the trusts therein—fall under any of the five heads mentioned in section 539 of the Code. This branch of the case is most clearly not a suit instituted for obtaining a decree (*a*) for appointing new trustees, (*b*) for vesting property in the trustees, (*c*) for declaring the proportions in which its objects are entitled, (*d*) for authorising any trust property to be sold, mortgaged, or exchanged, and (*e*) for settling a scheme of management. The words "further or other relief" that follow must necessarily be construed to refer to reliefs "*ejusdem generis*" and not to reliefs wholly outside those specifically defined under these five heads.

Because the plaintiffs have a good cause of action to institute a suit for obtaining certain reliefs under section 539, and they institute that suit to obtain such reliefs, after obtaining the

Advocate-General's consent, they have no right to smuggle into it another suit claiming other reliefs wholly different from those contemplated in the section, and then contend that they are entitled to maintain the whole suit, simply because they choose to consolidate two suits into one—one clearly within the purview of the section, the other wholly outside of it.

Reliance was placed on the case of *Thackersey Dewraj* v. *Hurbhum Nursey* [1], but a careful study of it will show that there is nothing in the decision that militates against the view I take of the position of the plaintiffs in this suit. In that suit it was held that it did not fall either under section 30 or section 539 of the Code. It was there held that "if the plaintiffs had any right of action, it was a complete right of action *vested in each of them*. They sued as subscribers to the temple and devotees of the idol, and as such each had a right to complain of mal-administration." It was further held that "any person interested in the proper observance of a religious endowment may sue in his own name to have the Trust property administered." That suit mainly related to mal-administration of certain funds whereby large sums were lost.

The nature of the plaintiffs' complaint in this suit is quite different. They complain of no mal-administration of charity Funds or Properties in which they are interested. By the action of the defendants, the plaintiffs—either as subscribers to the Funds or as devotees of the temples or as participators in the benefits of the charitable institutions—are not in the least degree damnified or injured. All they say is : "defendants threaten to commit a breach of their duty whereby *somebody else* will be injured." Let that somebody come forward and complain. The learned Judge trying the suit in *Thackersey* v. *Hurbhum Nursey* [1] to which I have referred, held that section 539 of the Code is permissive or directory and not mandatory, and that it did "not prohibit a private suit."

Mr. Mulla, in his commentary on section 539 of the Civil Procedure Code (2nd edn.), deduces at page 487 of his book

(1) (1884) 8 Bom. 432.

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the following proposition as the result of the authorities he cites there :—

"Suits brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right, are not within the section."

I am in entire accord with this proposition. I am of opinion that it correctly defines the scope of the section. This is undoubtedly a suit for the purpose of remedying an alleged infringement of an individual right, and, as such, is clearly not within the section.

This section contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. It seems to me very clear that "interest" of the parties here contemplated must be the "interest" that is threatened or infringed. Otherwise the result may be the infliction of grave injustice on parties who are not before the Court and who are not heard.

It was contended before us that, this being a suit with the consent of the Advocate-General, the Court was competent to adjudicate upon the rights of converts to Zoroastrianism. Assuming that the decision is against the contentions put forward by plaintiffs, the converts would naturally say :—"We are not bound by your decision : we never asked you to adjudicate on our rights. You never heard us. You don't know what documents we have in our possession in addition to what the plaintiffs produced before you. What right had the Court to decide questions relating to our rights in our absence, behind our backs and without giving us a hearing ?"

Even if the view I have taken as to the scope of section 539 was erroneous and assuming that the suit fell within the scope of that section, I would still hold that it was badly constituted and was not maintainable, the plaintiffs not have the "interest" contemplated by section 539. The object of having relators in a suit in the name of the Advocate-General, and of having plaintiffs who have an "interest in the trust" in a suit with the Advocate-General's consent, is to have in the suit parties who

are interested in asserting the rights and in redressing the wrongs for which the suit is filed. The converts whose rights we are asked to adjudicate upon have never been heard by us: they have never had a chance of putting their case before us: no one represented them; the Advocate-General knows nothing of their case; they never had a chance of putting their cases before the Attorneys or Counsel appearing for the plaintiffs. These are considerations that ought to govern our action on principle. It may be that the plaintiffs have presented to us the case of the converts in its best aspect, but the question whether this part of the suit is maintainable by them is a question of principle, and I feel that we ought to regard it from that point alone.

Regarding this branch of this suit, as a suit it is either a suit under section 539 or it is a private suit. As shown above, the reliefs claimed are clearly outside of the scope of operation of that section, and the suit cannot be said to be a suit under section 539. If, then, that section has no applicability, it must be treated as a private suit. As a private suit, the plaintiffs not being the persons damnified, they have no right to maintain it.

Regarded from either point of view, I come to the conclusion that the plaint discloses no cause of action in the plaintiffs; that the plaintiffs have no cause of action whatever against the defendants; that they have no right of action in them to claim the reliefs they do; and that they are not entitled to maintain this branch of the suit.

I would therefore dismiss this part of the suit, and find against the plaintiffs on the issues which raise the question of their right to maintain this suit.

So far as I am concerned, I might stop here and refrain from finding on the merits of the questions raised in this part of the case. Such a course, however, is, I think not open to me. Although my mind on the point I have discussed is free from doubt, it is possible that I may be wrong in the conclusions I have arrived at. Having regard to what I have said above, I am most averse to say anything on the merits. I feel that it would be most unfair to the parties, whose fight the third

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parties carried on before us, to express my findings on the merits in the absence of the parties whose rights are affected. I feel, however, at the same time, that it would be a disastrous thing for the parties if the case is sent back some months hence to find on all issues, in the event of my finding on the preliminary point being found to be erroneous. There has been an enormous expenditure of time, labour, and money in this case. I think it is extremely desirable that this litigation should reach the final Court of Appeal in as complete a form as possible. These considerations compel me to enter into a full discussion of all the points argued before us. However adverse my findings may be to the converts, I feel that they will do no injustice to anybody, as our judgment in this case cannot possibly bind those who now claim to be converts of those who may make a similar claim hereafter.

Even if I had come to a different conclusion on the technical point of law I have discussed above—even if, in the end, it is found that my conclusions on the point are erroneous—so far as I am concerned, my decision on the merits leads to the same result.

The plaintiffs are not content to base their case merely on the ground that the Zoroastrian religion not only permits but enjoins conversion: they go further, and contend that it has been usual and customary amongst Paris to admit Juddins—that is, persons born in another faith—into their religion. They say that such Juddins, on being admitted into the Zoroastrian faith, became not only *Zoroastrians* but *Parsis*; and that such converted Parsis have been always allowed to be carried to the Towers of Silence on their death, and that during their life-time they have entered all places of religious worship, such as Atash Behrams, Agiaries, and Dare Mehers, as a matter of right.

The plaintiffs' contentions shortly put are:—It is both usual and customary for Parsis to admit Juddins into their religion and give them all the benefits of all religious Funds and Institutions endowed or dedicated for the benefit of their own people.

They further contend that by the mere performance of the Navjot ceremony by a Parsi priest, thereby putting on a Sudra

and Kusti on the person of a Juddin, he makes him or her a full-fledged Zoroastrian without any other religious ceremony.

The defendants dispute the correctness of these contentions: they say that, although the Zoroastrian religion permits of conversion into the faith, the Parsis, ever since their advent into India, have not admitted a Juddin into their fold; that no entire alien, that is, a person born of non-Zoroastrian parents, has even been admitted into the faith. They admit, however, that children born of a Zoroastrian father by an alien mother have been allowed to come into their fold by the performance of the Navjot ceremony, by investing such children with the Sudra and Kusti.

In order to controvert the contentions of the defendants that it is not customary to admit Juddins or entire aliens, into the Zoroastrian faith, and that even if the religion enjoined conversion, such tenet of the religion had fallen into utter disuse and that long-continued usage prevailing amongst the Parsis prevented the admission of Juddins to Zoroastrianism, the plaintiffs called certain witnesses who professed to give some concrete instances of conversions of Juddins into Zoroastrianism. It will clear the ground and facilitate further discussion if I deal with this evidence, in the first instance, and record my findings thereon. [His Lordship then proceeded to examine the oral evidence on the point in detail and then went on as follows:—]

Under these circumstances, while I find that although the conversion of Juddins is permissible amongst Zoroastrians, I also find that such conversions are entirely unknown to the Zoroastrian communities of India; and far from it being customary or usual for them to convert a Juddin, the Zoroastrian communities of India have never attempted, encouraged, or permitted the conversion of Juddins to Zoroastrianism. [His Lordship again discussed evidence and continued—]

The last resting-place of the Parsis—the Towers of Silence—are regarded by them with sentiments of the utmost reverence. They are regarded as places of the greatest sanctity. When a new Tower is built it is consecrated with most elaborate religious ceremonies. Thousands of people travel long distances to be present at the consecration. Such presence is regarded as a pious act of great religious merit. Once the Tower is

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consecrated, none but a Nassesalar can enter it; and the Nassesalars lead a life of exclusion from the members of the community in various ways. The dead body of a Zoroastrian is regarded with peculiar veneration. On death the body is washed and purified and then handed over to the corpse-bearers, who recite prayers over it and clothe it in pure white linen. After the Suchukvani ceremony is performed, no one could touch it, not even the nearest relatives. Before being taken from the house for being carried to the Towers, other solemn ceremonies are performed; relatives and friends—and, in the case of a well-known person, all leading members of the community—assemble and prostrate themselves before the body when they are taking their last look. The face is covered up and then the body starts on its journey to the Towers. No Juddin or Durvand is allowed to look at a dead body after the purificatory ceremony is performed, much less touch it. Many a time it has happened that when a faithful servant of a European is dead, his master, entertaining kindly feelings towards him and wishing to have a last look at his faithful servant, goes to the house of the dead, only to find that his request is, with many explanations and excuses, refused. The bodies of persons who have suffered capital punishment, the bodies of suicides, and the bodies of people on whom *post-mortem* examinations are held, are supposed to be contaminated and not fit to be put in the same Dokhma as the bodies of ordinary Zoroastrians, because their bodies after death have been touched by Durvands. In Bombay, there is a separate place for these bodies known as Chotra. In other places, if there is no Chotra, some unused Dokhma which has fallen into disrepair is used for disposal of these bodies, as was said to be done at Surat.

[His Lordship went into an examination of the literature extant on the subject and arrived at the following conclusions—]

To sum up this part of the case, on the question of conversion the conclusions which I have arrived at on the evidence before the Court are:—

I.—That the Zoroastrian religion not only permits but enjoins the conversion of a person born in another religion and of non-Zoroastrian parents.

II.—That although such conversion was permissible, the Zoroastrians, ever since their advent into India 1,200 years ago, have never attempted to convert anyone into their religion.

III.—That there is not a single instance proved before the Court of a person born of both non-Zoroastrian parents ever having been admitted into the Zoroastrian religion professed by the Parsis in India.

IV.—That the Parsi community of Bombay, at a Public Meeting, held on the 16th of April, 1905, expressed its disapproval of any conversions being allowed, and are strongly opposed to any such conversion in the present times, and resolved henceforth not to admit even the children of Parsi fathers by alien mothers. See Exhibit F.

V.—That, although conversion is permissible by the religion, there are certain conditions which the candidate must fulfil before becoming eligible for admission. The conditions are that it must first be satisfactorily established that he or she, in applying for admission, is animated by a good object and actuated by pure intentions, in other words, that he or she seeks admission from religious convictions and not from other considerations: and further, that the candidate is in all other respects fit to be admitted to the Zoroastrian faith.

VI.—That such an admission of a person born outside of the religion is only permissible if it is established that by such admission "no harm of any kind would be done to the Zarthosti Mazdiyasnans themselves."

VII.—That the ceremonies necessary to be undergone by the candidate for admission are (*a*) Navjot, (*b*) Burushnum, and (*c*) a repetition of the Investiture ceremony of Navjot after Burushnum.

VIII.—That only those persons who have undergone these three ceremonies are entitled to the full rights and privileges of a Zoroastrian.

The only question of importance on this part of the suit that now remains to be considered is the general question raised by the plaintiffs, *as to who are the parties entitled to the benefits and uses of the Charitable Funds and Institutions now in the*

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possession and under the management of the defendants. The contentions of both sides are fully set out in the pleadings. The plaintiffs say:—

"There exist numerous rich endowments, consisting of property, both moveable and immoveable, devoted to various charitable and religious purposes for the benefits of *persons professing the Zoroastrian religion.*"

They say that the trust declared by the Trust Deed of the 25th of September 1884, are in terms "at variance with the trusts and purposes for and to which the same were originally provided and dedicated."

The plaintiffs believe that, "at the time the said Deed was prepared and executed, there was no intention by the terms thereof to exclude from the benefits of the said Trusts *any person* professing the Zoroastrian faith." They complain that the defendants had interpreted the trusts in a manner which would exclude from the benefits of the trusts persons born in other religions and subsequently admitted into the Zoroastrian religion; and they pray that, in so far as the trusts declared by the Deed of 25th of September 1884, differ from the original trusts, they may be declared *ultra vires* and void; that the true trusts on which the charitable properties are held may be ascertained and declared; that the deed of 1884 may be construed; and that it may be declared who are entitled to the benefits of such of the trusts as may be held to be valid.

The defendants contend that the only persons entitled to the benefit of the Funds and properties are:—

First.—The descendants of the original emigrants into India from Persia who profess the Zoroastrian religion.

Secondly.—The descendants of the Zoroastrians in Persia who were not amongst the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroastrian religion.

Thirdly.—The children of a Parsi father by an alien mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion.

Shortly put, the plaintiffs say: Every Juddin admitted into the Zoroastrian religion is entitled, as a matter of right, to all

the benefits of all the Charitable Funds and Institutions in the defendants possession.

The defendants say: The parties entitled to the benefits of the Funds and Institutions under their control are persons who are Parsis who are the descendants of the Zoroastrian emigrants from Persia; their Iranee co-religionists who may come and settle either temporarily or permanently in India; and the children of Parsi fathers born of alien mothers, if they are admitted in, and profess, the Zoroastrian religion.

As the question is raised in a general form, I will discuss it on the assumption that the converts to Zoroastrianism, whose rights the plaintiffs assert and the defendants deny, are properly admitted into the Zoroastrian religion, after the performance of all the ceremonies which, according to the Ravayats and the experts, are necessary for the due admission of a Juddin to Zoroastrianism.

The Trust Deed of 1884 declares that the properties covered by that Deed were for the use and benefit of "the members of the Parsi community professing the Zoroastrian religion." This is the only declaration which the plaintiffs say is at variance with the original trusts declared by the founders and donors. They say, either this declaration is wrong, or the interpretation put upon it—that the trusts are confined to Parsis, thereby meaning persons of Zoroastrian descent—is wrong. They contend that a Juddin, by being converted to Zoroastrianism, becomes a "member of the Parsi community professing the Zoroastrian religion," and as such is a beneficiary under the trusts. In the alternative, they say, if this contention of theirs as to the correct interpretation is wrong, then the declarations of trusts are at variance with the intentions of the original donors and founders and the Trust Deed should be rectified by the Court.

A great deal of time and energy were expended on the argument as to the exact meaning and significance of the word Parsis, and as to whether the words *Parsis* and *Zoroastrians* mean the same thing and designate the same persons, or whether there is any distinction in the individuals designated by the terms Parsis and Zoroastrians.

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I confess this question has never, at any time, presented any difficulty to my mind: a Zoroastrian is a person who professes the Zoroastrian religion. A Zoroastrian need not necessarily be a Parsi. Any one who professes the religion promulgated by Zoroaster—be he an Englishman, Frenchman, or American—becomes a Zoroastrian the moment he is converted to that Faith. But how can he become a Parsi? It was argued that the sixth plaintiff's wife was now a Parsi. Supposing a Parsi lady becomes a Christian and marries a Frenchman, can it be said that she had become a Frenchwoman. And if she adopts Christianity and marries an Englishman, does she become an Englishwoman? One has only to see how the word Parsi came into existence and what it was meant to designate to realize that the word Parsi has only a racial significance and has nothing whatever to do with his religious professions. Mr. Dossabhoy Framji in his "*History of the Parsis*," says the word takes its derivation from Pers or Fars, a province in Persia, from which the original Persian emigrants came to India. Several witnesses corroborate this. One witness, Mr. Jamsetji Dadabhai Nadershah, who has visited Persia and studied the cuniform inscriptions in Persia, throws more light on the subject. He says:—

"In the Assyrian records I find the earliest mention of the word Pers. The word is applied to the country called Fars and to the people of that country . . . The word originally used for a province was applied to the whole country of Iran (Persia) later on. The word Pers in the Babylonian inscriptions was first used to indicate the country, and then it came to indicate the inhabitants of that country."

It will thus be seen that the word Parsi, when used in India could only mean the people from Pars. When the emigrants from Persia settled in India, the people around them probably knew little of their religion but they knew they came from Pers or Fars, and they called them Parsis. Thus, all the descendants of the original emigrants came to be known as Parsis. A Parsi born must always be a Parsi, no matter what other religion he subsequently adopts and professes. He may be a Christian Parsi, and he may be any other Parsi, according to the religion he professes; but a Parsi he always must be. The word Zoroastrian simply denotes the religion of the individual: the word Parsi

denotes his nationality or community, and has no religious significances whatever attached to it. To my mind, the distinction between the two terms, Zoroastrian and Parsi, is most clearly defined when one sets about carefully examining the real meaning of the two expressions; but before the French wife of the sixth plaintiff proposed to be converted to the Zoroastrian religion and claimed to have become a Parsi, I doubt if anyone ever cared to make the smallest distinction in the use of the two words. Before 1903, no one ever gave a thought to this distinction. As late as 1872, in a legislative enactment (Act III of 1872) the manifestly unmeaning expression "Parsi religion" is used to designate the Zoroastrian religion. Surely, there is no Parsi religion in existence. What, however, was intended to be conveyed by the expression was the religion generally professed by the Parsi community. To my mind, the expression "Parsi religion" is as meaningless as the expression: "English religion," "French religion," or "Dutch religion." Before the controversy in connection with the French lady arose, no one had the remotest idea that a Zoroastrian could be anybody other than a member of the Parsi community. For centuries, the only people who in India professed the Zoroastrian religion were the members of the Parsi community born in the religion of their forefathers. No one had for twelve centuries ever made an attempt to convert persons professing other religions. Proselytising was wholly unknown amongst them. No one preached the religion or attempted to teach it to an alien. There was not an instance known either in modern or ancient times, of anybody but a Parsi who professed the Zoroastrian religion. The Zoroastrian religion was professed by the Parsis alone in India; and small wonder, therefore, if the expressions Zoroastrians and Parsis came to be loosely used, as if the two words meant one and the same thing. In 1884, it was not within the contemplation of any one that, in the near future, converts to Zoroastrianism would come into existence, and neither the English Solicitor who drafted the Deed of the 25th of September, 1884, nor those who instructed him to prepare the Deed, and who subsequently executed the same, had the remotest conception of such a class or such an individual as an alien Convert to Zoroastrianism

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coming into existence; and therefore there could be no possible object in intentionally declaring wrong trusts or trusts at variance with the intentions of the donors and founders. In fact, in paragraph 12 of their plaint, the plaintiffs themselves say that, in declaring the trusts as they are declared in the Deed of 1884, there was no intention "to exclude from the benefit of the trusts any person professing the Zoroastrian faith," meaning thereby Juddin converts to Zoroastrianism. This, at all events, is an admission that there was no intentional wrong declaration of trusts in the Deed of 1884. Till 1903, the two expressions, Parsis and Zoroastrians, were used most promiscuously to mean one and the same thing. When the members of the Parsi community professing the Zoroastrian religion were sought to be designated, some used the word Parsis and some used the word Zoroastrians. Since the controversy, some persons who established new charities have, in order to avoid all possible misunderstanding and to have no room for doubt, used the expression Parsi Zarthosti. This is by no means a new combination. As far back as 1836, Framji Cowasji Banaji uses the expression "Parsi Zoroastrian" in his letter to his colleagues of the Punchayet (Exhibit A59). Many witnesses were questioned on the subject and they were all unanimous that Parsis and Zoroastrians were used as synonymous terms and conveyed the same meaning. Plaintiffs' witness, Mr. Sheriarji Bharucha, says:—

"I would use the two terms Parsis and Zoroastrians as synonymous terms. This is the way in which these terms have always been used and are still used. As soon as the word Parsi is used, the only idea suggested is that he is a Zoroastrian."

Beram Sheriar, an Irani priest, another of the plaintiffs' witnesses, says:—

"Some Mahomedans in Persia call us Parsis; some call us Zarthostis. The word Parsis is in common use in Persia. It means Zarthosti. Mussulmans in Persia use the word Parsis commonly to designate our people—the Zarthostis."

Another of the plaintiffs' witnesses, Mr. Jamsedji Dadabhai Nadersha, points out how the words Parsi and Zoroastrian are used indiscriminately in certain Pehlvi and Persian works. The defendants' principal witness, Mr. Jivanji Mody, says:—

"In India, the word Parsis or Zoroastrians has the same signification."

The Parsi high priest, Dustoor Darab, says :—

"The two terms Parsi and Zoroastrian are synonymous, because in India we have made no conversions. Every one in India knows that they are convertible terms."

This discussion as to the exact meaning and signification of the words Parsi and Zoroastrian was addressed to us on the question as to whether, if the trusts declared in the Deed of 1884, were correctly interpreted by the defendants and those declarations excluded Juddin converts, such declarations were not at variance with the intentions of the donor and founders of the charities. It so happens that there are no documents, either in original or in copies, existing at present with reference to some of the immoveable properties; in the case of other immoveable properties, the defendants have amongst their records copies of original documents. Mr. Lowndes, for the plaintiffs, correctly contended that in cases where no originals or copies of any documents evidencing the trusts in connection with a particular property existed, the question for whose benefit that particular charity was established must be gathered, to use his own words, "from usage and tenets of the founders." He contended that the question for the Court to ascertain was "What were the intentions of the founders of these various charities as to persons who were to benefit by them," He argued: "Where words are ambiguous, you must look at the tenets of the founders." And he claimed the right of proving copies and tendering them in evidence, contending that the documents were "admissible for the purposes of ascertaining the meaning of the words Parsis and Zoroastrians." I have here reproduced the arguments of the learned counsel in his own language as I find them in my notes made at the time.

These arguments appeared, both to my learned brother and myself, to be absolutely sound; but what was the attitude adopted by the defendants? Their counsel contended that section 7 of the Statute of Frauds, XXIX of Charles II, Chapter III, was in force in British India, and that under the provisions of that section, copies of documents evidencing trusts of immoveable properties were neither *proveable* nor *admissible* in evidence.

This position, adopted by the defendants, appeared to me to be most extraordinary. They admitted that they were trustees

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holding a large number of immoveable properties on certain Charitable Trusts for the benefit of their community. They were in possession of copies of documents evidencing those trusts. They were not in a position even to suggest that those copies were not genuine and authentic. In fact, they knew that they were authentic and genuine copies. They were subsequently proved to be such before us. The records in their possession which contained the copies were not their property but were the property of the Parsi community. They knew that a question of the greatest importance to their Community was being dealt with by the Court. Their obvious duty as trustees, it seemed to me, was to place all available materials in their possession and at their disposal before the Court and to assist the Court to come to a correct decision. Instead of that they made a determined effort to keep back important documents, by pleading a section of an English Statute of 1677! We felt, however, that if the defendants had a legal right to withhold these documents, they were entitled to do so, and that the Court was not concerned as to whether the attitude the defendants were advised to adopt was a correct attitude for trustees of large public charities to adopt; and we had to listen to long and learned arguments on this point with the result that we held that there was no substance in the defendants' contentions. I do not propose to wander through the labyrinth of legal authorities which were cited before us, for in my opinion the defendants' contentions on this head could be very shortly and summarily disposed of.

Section 7 of the Statute of Frauds runs thus :—

"VII. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June, all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

It was argued on behalf of the defendants that, under this section, no trusts of immoveable properties could be proved, unless the trusts were manifested and proved by some writing signed by the settlor or founder. In other words, the defendants contended that the plaintiffs could prove no trusts whatever of

some of these immoveable properties held by them as there were not in existence original documents signed by the founders themselves manifested or proving those trusts. This contention came to this, that the trusts of immoveable properties, in respect of which there were no documents signed by the original founders, were, in the words of the Statute, "utterly void and of none effect." It appears that in 1881, in the case of *Bai Maneckbai* v. *Bai Merbai*[1], Mr. Justice West held that the Statute of Frauds applied to "the inhabitants of Bombay," and he thought also to the Parsis. I do not think it is necessary to go into the question argued before us, whether the Statute of Frauds really ever did apply to India. Assuming that Mr. Justice West was right, what happened was that, in the following year, the Legislature simplified matters when they passed the Indian Trusts Act by repealing section 7 of the Statute by section 2 of that Act. The learned Counsel for the defendants, however, contended that inasmuch as section 1 of the Indian Trusts Act provided that nothing therein contained applied to public or private religious or charitable endowments, the repealed section still applied to Charitable Trusts and was only repealed so far as it related to private trusts. This argument, if true, leads to some manifestly absurd situations. If correct, it means that the Legislature deliberately removed a legal enactment which, might have proved a powerful instrument for the purpose of defeating trusts in the hands of dishonest trustees, so far as private trusts were concerned, and yet left all public Charitable Trusts open to this infirmity.

If, for instance, a man conveys two of his immoveable properties to trustees on trusts, one for the benefit of his family and the other for public charitable purposes; executes two Trust Deeds and registers them; and then by some mischance the two Trust Deeds are lost, burnt, or destroyed, the beneficiaries of the family trust could always prove the trust by the copy from the Registrar's records; but inasmuch as the copy relating to the public Charitable Trusts is not signed by the party "who is by law enabled to declare the trusts"—which, according to Mr. Strangman's argument, means the founder and no others—the

(1) (1881) 6 Bom. 363.

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Charitable trust becomes "utterly void and of none effect." I put this view to the learned Counsel and he said that that was the law. I decline to believe that the Legislature intended anything so manifestly absurd and so repugnant to one's common sense. In my opinion, the saving clause in section 1 of the Indian Trust Act has no applicability to the repealing section that immediately follows, and that section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act of 1882.

That this view is correct appears also from "A Collection of Statutes relating to India," published in 1899, under the authority of the Government of India. In Volume I, Appendix I, at page 490, I find it distinctly stated that sections 7 to 11 of XXIX of Charles II, Chapter III, are repealed by section 2 of the Indian Trusts Act of 1882.

There is, I think, another equally effective answer to the objection based on section 7 of the Statute of Frauds. Do the words "the party who is by law enabled to declare such trust" mean only the founder and no one else, as contended on behalf of the defendants? I think not. In *Rochefoucauld* v. *Boustead*[1], where the defendant pleaded section 7 of the Statute of Frauds as a defence to a suit in which a declaration was sought that he had purchased certain immoveable property as a trustee for the plaintiff, the Court of Appeal held that the letters signed by the defendant himself were sufficient to satisfy the requirements of the Statute. Lord Justice Lindley, in delivering the judgment of the Appeal Court, after citing *Forster* v. *Hale*[2] and *Smith* v. *Matthews*[3], says (at pages 205-206):—

"According to these authorities, it is necessary to prove, by some writing or writings *signed by the defendant*, not only that the conveyance to him was subject to some trust, but also what that trust was. But it is not necessary that the trust should have been declared by such a writing *in the first instance*: it is sufficient if the trust can be proved by some writing *signed by the defendant*, and *the date of the writing is immaterial*."

The Court of Appeal also admitted parol evidence in addition to the defendant's letters, "holding that other evidence was

(1) [1897] 1 Ch. 196.
(2) (1798) 3 Ves. 696.
(3) (1861) 3 D. F. & J. 139.

admissible in order to prevent the Statute from being used in order to commit a fraud."

Now, in this case, the commission of a fraud was, of course, farthest from the defendants' intentions. It is hardly conceivable that the defendants desired to contend that the trusts in respect of those Towers of Silence in respect of which there are no documents at all, and the trusts of other properties in respect of which there are no documents signed by the founders, were therefore "utterly void and of none effect." It appears to me that all that their legal advisers intended to do was to put obstacle in the way of the plaintiffs' proving what they said they could prove by a reference to the documents in the defendants' possession, namely, that the founders of the charities to which these copies in defendants' possession related were intended for the benefit of all Zoroastrians, including Juddin converts.

However that may be, *Rochefoucauld* v. *Boustead* [1] is authority for holding that admissions of being trustee and what those trusts were—contained in the letters of the trustee himself, the defendant in the case—were sufficient to satisfy the provisions of section 7 of the Statute of Frauds, and that it is immaterial at what date such writings came into existence.

I am of opinion, therefore, that in this case the Trust Deed of the 25th of September 1884, would satisfy the provisions of the Statute, even if the 7th section had not been repealed. The defendants' predecessors in 1884 were "persons enabled by law to declare" that they held certain immoveable properties in trust and also to declare what those trusts were. They did so by the Trust Deed of 1884. The question between the parties is whether, if their interpretation of the Deed of 1884 is correct, the trusts they declared were in accordance with the original trusts as intended or declared by the founders, or whether they were at variance with the trusts declared or intended by the founders. In order to ascertain this, it was necessary that we should have before us all such documents as were properly proveable and admissible under the provisions of the Indian

(1) [1897] 1 Ch. 196.

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Evidence Act, and we accordingly allowed the plaintiffs to prove and put in copies of the various documents relating to the foundation of various Charitable Institutions. The persistence with which this point was pressed seems very extraordinary, in the face of the fact that the defendants themselves, in paragraph 25 of their Written Statement, submit the question "whether persons in whose possession and under whose control the said properties were, were not entitled to declare the trusts thereof as they did by the said Deed of the 25th of September 1884."

Further, it appears to me, on a careful study of the section, that, in spite of the concluding words "shall be utterly void and of none effect," the section is really one that regulates procedure, and that, even if it did apply to India at one time, the enactment of the Indian Evidence Act would supersede this section of the Statute. The scheme of the section is undoubtedly to regulate how trusts were to be proved in a Court of Law, and the concluding words merely denote what the result should be if a particular mode of proof was not available. What Lord Justice Lindley says in his judgment in *Rochefoucauld* v. *Boustead* [1] lends support to this view. Referring to the contention, that the Statute of Frauds had no application to lands in Ceylon, Lord Justice Lindley says (at page 207) :—

> "The Statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this : it regulates procedure here, not titles to land in other countries."

I am inclined to hold that section 7 of the Statute of Frauds was mainly intended to regulate procedure, and that it never applied to this country at any time; but, even if it did, I hold that the Evidence Act, when it came into force, entirely superseded it. The Legislature, however, without waiting, and in order to avoid complications—on the assumption that his view was correct—repealed the section as soon as they found that Mr. Justice West thought it applied to the inhabitants of Bombay and to the Parsis. Possibly, the view was correct. I have not gone into the question very fully, because I hold that

[1] [1897] 1 Ch. 196.

if it did apply, it was wholly repealed by the Indian Trusts Act of 1882, both as regards Public and Private Trusts. I also hold that the Trust Deed of the 25th of September 1884, fully satisfies the provisions of section 7 of the Statute of Frauds, even if it had not been repealed and was still in force as regards Public Charitable Trusts.

The immoveable properties in respect of which we have to ascertain what the real trusts are, in order to find out whether Juddin converts were intended to be included amongst the beneficiaries, are the Five Towers of Silence at Malabar Hill and the three Sagdis, the Sagdiwala's house, the Fort and Baharkote Nasakhanas and the Godavara Agiary. [His Lordship enumerated those documents and proceeded :—]

These are all the documents relating to the immoveable properties dedicated to charities which are the subject-matter of the contentions between the parties, and after carefully going over every one of these documents, I have set out in full, I believe, every expression relied on by the plaintiffs in support of their contentions, that these expressions were intended to include all Juddin converts to Zoroastrianism.

The language used in all these documents is, to my mind, most clear and unambiguous. The people for whose benefit these institutions were established, the persons for whose use these religious establishments were founded, *were the members of the Zoroastrian Community of Bombay.* The expressions most frequently used are "Zoroastrian population of Bombay," "the Zoroastrian *Anjuman*," "the people of the Zoroastrian *Community*," "the people of the *Anjuman of the Mazdiasni faith*," "the whole *Anjuman*," "the Holy Zoroastrian *Community* of Bombay," "the Dustoors, Mobeds, Herbuds, and Behedins of the Mazdiasnian religion of the Holy Zoroastrian *Community*," "the entire Zoroastrian *Anjuman* of Bombay," "persons of the *Firka* of the pure and best Mazdiasnian religion," "the Zoroastrian *Community* of Hindustan," and "the Khas-va-Aam of the Zoroastrian *Anjuman*."

The utmost stretch of imagination cannot convey to my mind the impression that the Founders, when they used the expres-

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sions set forth, meant or intended to include amongst the objects of their benefaction, the Lalias of Bombay, the Dubras from Surat, and the Bhangis, Mahars, and Kahars of Gujarát.

A Juddin may become a Zoroastrian, but how he ever could possibly become a member of "the Holy Zoroastrian *Anjuman of Bombay*," or be one of "the members of the Zoroastrian *Community of Bombay*," or become one of "the *Anjuman* of the Mazdiasni faith," passes my comprehension. A Juddin converted to Zoroastrianism had never come into existence. Such a person could not possibly have been within the contemplation of the donors and founders: the possibility of such a being coming into existence would be so new and novel that if the donor ever conceived such an idea and intended to include him in his benefaction, he would certainly designate him separately and specially, and not include him in the general description of the community of his then existing co-religionists and their descendants. It would be a most violent presumption to make —a presumption utterly unjustified by the circumstances existing at the time when these institutions were founded – that the possibility of a Juddin convert to Zoroastrianism was ever present to the minds of these founders and that they intended to include him.

I have not the smallest doubt that if the contingency of an alien being ever admitted into the religion had been present to the mind of the founders as being even most remotely possible, they would have made special provisions *to exclude* them. The conditions made by Bisni, when handing over his Tower to the Anjuman, are typical of the feelings entertained by religiously-inclined Parsis of those days. It was only such Parsis as were most religiously inclined and were devout followers of the tenets of the religion as they understood them then, that would found and endow such institutions as those the Court is dealing with now. And if they objected to even a Parsi corpse touched by Durvands being disposed of in the Towers of Silence—if they considered that the corpse of a Parsi was polluted by having a *post mortem* performed on it, or by even an inquest held on it, or by being brought from upcountry through Durvand Agency --

how could they be expected to have contemplated a Durvand's body being disposed of in the Towers; for, no matter what five or ten thousand years ago the Zoroastrian religion laid down as to proselytisation, their ideas since their advent into India had crystalized into the belief that a Durvand's touch, or even his gaze, was enough to defile a Parsi corpse, and if such a corpse is not allowed to be carried to the Towers for disposal and is placed on a Chotra or an unused Tower, how could they be supposed to have contemplated the possibility of a Durvand corpse being carried to the Towers so zealously guarded from even the approach of a Durvand? A Durvand Zoroastrian was a being who never *entered* their thoughts.

To my mind, the language is clear and unambiguous. The plaintiffs, however, argue, that the language is capable of including and does include, Juddin converts. In interpreting documents, there is abundant authority for saying that the Courts must so construe documents that, when the intentions of the donors and founders are clearly ascertainable, they must be given effect to. I will assume, for the sake of argument, that the language of the document is ambiguous, meaning thereby that it is such that it is capable of both interpretations—the one urged by the plaintiffs and the other contended for by the defendants. In that case the documents should be interpreted according to certain well-established canons of construction.

In Tudor's Charitable Trusts, page 169 (4th edn.), the result of the authorities is summed up as follows:—

"If the intention is expressed in the instrument of foundation . . no difficulty arises. When, however, it is not so expressed, or is expressed in ambiguous terms, recourse must be had to extrinsic circumstances, such as the known opinions of the founder . . . contemporaneous usage, or the like, for determining who are the objects of the charity."

In *Smith* v. *Packhurst*,[1] Lord Chief Justice Willes says:—

"Before I proceed to the questions, I shall lay down some general rules and maxims of the law, with respect to the construction of deeds; first, it is a maxim that *such* a construction ought to be made of deeds *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary.

(1) (1742) 3 Atk. 135.

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"Another maxim is that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor . . . . we have no power, indeed, to alter the words or to insert words which are not in the deed; but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible: These maxims, my Lords, are founded upon the greatest authority, Coke, Plowden, and Lord Chief Justice Hale, and the law commends the *astutia*, the cunning of Judges in construing words in such a manner as shall best answer the intent: the art of construing words in such manner as shall destroy the intent may show the ingenuity of Counsel, but is very ill-becoming a Judge."

In the case of the *Attorney-General* v. *Drummond*,(1) Lord Chancellor Sugden, says:—

"One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means."

This case went to the House of Lords, *Drummond* v. *The Attorney-General*(2) where Lord Campbell, laid down this rule:—

"In construing such an instrument, you may look to the usage to see in what sense the words were used at that time; you may look to contemporaneous documents . . . to see in what sense the words were used in the age in which the deeds were executed."

Sir John Romilly, Master of the Rolls, in *Attorney-General* v. *The Dedham School*,(3) says:—

"What this Court looks at, in all charities, is the original intention of the founder, and . . . . . this Court carries into effect the wishes and intentions of the founder of the charity."

While looking at the various authorities laying down general rules of construction, I came across a case which goes further than any case I have ever known. In this case, *Fowell* v. *Tranter*(4), Baron Bramwell says:—

"The plaintiffs labour under this difficulty, that they admit the natural and grammatical meaning of the words to be against them. The golden rule of construction is, that words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or *unless*

(1) (1842) 1 Dr. & W. 353 at p. 368.
(2) (1849) 2 H. L. C. 837 at p. 863.
(3) (1857) 23 Beav. 350 at p. 355.
(4) (1864) 3 H. & C. 458.

there be some very cogent reason of convenience in favour of a different interpretation."

I have referred to this last case only for the purpose of showing to what lengths Courts will be prepared to go to carry out the intentions of the parties in the Instruments that come before the Court for construction. In the view I have taken of the meaning of the expressions used in the Instruments before the Court in this case, it is unnecessary to invoke the assistance of the rule laid down by Baron Bramwell. If, however, the "natural meaning" of the words used had been differently construed, if the natural meaning had been what the plaintiffs contended for, I should not have hesitated to hold that in the present case there are many "very cogent reasons of convenience in favour of a different interpretation." The reasons would not only be cogent reasons, but they are, to my mind, very imperative reasons. If the interpretation sought to be put upon these instruments by the plaintiffs was to prevail, the plaintiffs would succeed in encompassing the disintegration and ruin of the whole Parsi community. We were told by the learned counsel for the defendants that the Parsis were proud of the fact that there were no street beggars and professional prostitutes amongst the Parsi community and the community took care of its own paupers and cripples. If the plaintiffs' contentions prevailed, the community would very soon have no reason to boast of these characteristics of their race, and the Parsis would soon cease to exist as a *community* by reason of the rapid invasion of all pauper Sweepers and Dubras of Gujarát, who would, no doubt, be attracted to the *Holy Mazdiasni religion* by reason of the *fifty-three lacs of rupees* in the possession of the defendants, and the other advantages of belonging to the Anjuman of the Holy Zoroastrians of Bombay. It must be remembered that the question must not be judged from the standpoint that, in the present instance, the plaintiffs are fighting for the admission of an educated and cultured lady, belonging to one of the most civilized nations of Europe. That is a mere accident. If the Court had to take into consideration "cogent reasons of convenience," it would necessarily have to consider what would be the immediate and natural result of reading the documents

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in a way which would throw open the door to general and promiscuous admissions of converts.

As, however, I have said before, there is no necessity, so far as I am concerned, for departing from the ordinary rules of construction. As Mr. Jiwanji Mody pointed out in his evidence, the Parsis of India constitute distinct communities at the various places where they have settled down. We have the Parsi Anjuman of Bombay, the Parsi Anjuman of Surat, the Parsi Anjuman of Navsári, the Parsi Anjuman of Calcutta, of Madras, and even of such places as Cambay and Ootacamund, where there are only a very very limited number of Parsis. When establishing Charitable Institutions, or endowing Funds for religious or charitable objects, the ruling idea appears always to be that it is for the benefit of the community of the place where the Institution is founded or the Fund is endowed. Wherever Parsis settle down in a place in sufficient numbers to feel the want of a Tower or an Agiary or Fund for maintaining an establishment of corpse-bearers, they founded these Institutions either by general subscriptions amongst themselves, or some wealthy charitably-inclined Parsi founded them at his own expense. The Institutions and Funds are for the use and benefit of the community of that place. New comers, who settle permanently in the place, contribute towards the upkeep of the Institutions and add to the Funds according to their means on all auspicious and inauspicious occasions. When some co-religionist visits the place, he is, as a matter of course, allowed to use the Agiary of the place, and if he should die in the place, he would be carried to the Tower of Silence of that place; but unless he has settled down in the place, he is not a member of the Anjuman of that place. Supposing a party of Parsis was travelling in Gujarát, they would all be allowed, without question, to go into the Atash Behram or Agiary of the places they visit, to say their prayers, to make their obeisance to the Sacred Fire, and present sandalwood to the Fire Temple, and make money presents to the priests attached to the Institutions. If some one of the party died, his corpse would be carried to, and disposed of in, the nearest available Tower. The mere extension of those privileges do not make them the members of a particular

Anjuman of a particular place. The Institutions and Funds that are the subject-matter of contention in this suit, were all of them endowed and founded for the *Parsi Community of Bombay* and every expression used conveys but one meaning, *viz.*, that they are for the use and benefit of the members of that community.

On this subject, it is important to remember that we are not asked to construe formal documents founding the Institutions. They are more or less informal documents, relating in some way to the Institutions, none formally founding any one of them, such as a deed of conveyance or a declaration of trust.

It is also of importance to remember that, in many instances, there are no documents at all. For instance, there are no documents relating to three of the most ancient Towers out of five; there are no documents relating to one of the Sagdis; there are no documents relating to the Fort Nasakhana and the Sagdiwalla's house; and the only document relating to the Baharkote Nasakhana is a release passed by the executors of the founders, years after the death of the founder.

How is the Court to ascertain the Trust relating to these Institutions, which are the greater portion of the Institutions in question in the suit? By ascertaining the usage prevailing in the community and by the tenets of the founders. The Court must ascertain the intentions of the founders, by first ascertaining what has been the usage prevailing in the community and what were the tenets of the founders of those charities. That is what the learned counsel for the plaintiffs has himself urged. I entirely concur in this view, and am willing to apply those tests to find out who were the objects intended to be benefited by the founders of these benefactions. [His Lordship referred to certain documentary evidence at this point and continued—]

The facts to be gathered from these Exhibits appear to be that, in the early part of the last century, Parsi children by alien mothers were allowed to be invested with Sudra and Kusti without much difficulty, but when the evil grew, there was opposition to this practice, and at first such practices were sought to be

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restricted by making the previous permission of the Punchayet necessary, but later on the feeling against admissions grew stronger and it was resolved not to admit such children at all, and various pains and penalties were prescribed for those who transgressed the Resolutions passed by the Anjuman.

The defendants called a number of leading members of the Parsi community—members of well-known Parsi families who had made contributions to some of the Charity Funds. They all said it was never their intention that Juddin converts should profit by their benefaction; in fact, they said such a class was not present to their minds till the present controversy arose. If this is true of present times, *a fortiori* it must be true of remoter times and of people of former generations, who appear to be much more fervent, not to say bigotted, in their religious beliefs and observances than Parsis of the present day.

All the materials available for the purpose of ascertaining the tenets of the Founders tend to show that they never could have intended their benefactions to be for the use of Juddin converts. One can gather the tenets of the Founders by ascertaining the tenets of their predecessors, their contemporaries and their descendants; and taking all the surrounding circumstances of the times into consideration I find that all the indications most unmistakably point out that the idea of admitting a Durvand to their religion must at all times have been repugnant to the Parsis of the olden times. It is only on the advent of "reformers of religion," such as Mr. Sheriarji and possibly the birth of the reforming Subbha he served, that has instilled this idea of Durvand conversion in the minds of a very small section of the community.

For the reasons I have recorded above, I come to the conclusion that even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefits of the Funds and Institutions now under the defendants' management and control; that these were founded and endowed only for the members of the Parsi community; and that the Parsi community

consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranies from Persia professing the Zoroastrian religion, who come to India, either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

I ought not to conclude the consideration of this branch of the case without referring to two cases relating to Parsis, decided by our Courts, which have, I think, a most important bearing on the present question. The plaintiffs say: the Zoroastrian religion permits and enjoins conversion, therefore admit Juddins. The defendants say: the usage of 1,200 years is not to admit such Juddins, although the religion may allow of such admission. What is to prevail? The tenets of the religion or the ancient uage of those professing the religion?

In *Peshotam Hormasji Dustoor* v. *Meherbai*[1] the late Mr. Justice Scott held that usage must prevail over tenets. He says:—

"The Zoroastrian system would seem not to have contemplated marriage in infancy. The marriage ceremony of *Ashirvad* includes a prayer (the *nikah*), or exhortation to the parties, which would be senseless if it were not addressed to persons capable of matrimonial union in every sense. The Zend Avesta contains many passages which exclude the idea of infant marriage .....

"*But custom seems to have wandered from the pure doctrine of the Zend Avesta; and the law, whether English or Persian, can only be applied subject to any well-established usage.*

"When the Parsis settled in Western India eleven hundred and sixty years ago, they probably brought with them a system, both of law and custom, from Persia. But it was all unwritten, and gradually fell into desuetude, and this mere handful of Persian strangers gradually and naturally adopted much of the law and usage that obtained in the Hindu community, in whose midst they were forced to dwell."

The effect of this judgment is that, although—according to the tenets of the Zoroastrian religion, as gathered by the learned judge from the Zend Avesta, the Ravayats of which he speaks as the opinions sent by the wise men of Persia and from other

(1) (1888) 13 Bom. 302 at p. 311.

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sources—infant marriages were not permissible or legal, a usage had sprung up amongst the Parsis of performing infant marriages, and he allowed usage to prevail over the tenets of the religion and held an infant marriage to be legal and binding, though not permissible or legal according to the tenets of the Zoroastrian religion.

This judgment of Mr. Justice Scott was approved of and followed in *Bai Shirinbai* v. *Kharshedji*[1], by our late Chief Justice Sir Charles Farran and Mr. Justice Hosking.

These are very clear authorities for holding that a well-established and ancient usage prevailing amongst a community must over-ride such of the tenets of their religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community.

The result is that I hold that the plaintiffs are not entitled to any of the reliefs claimed by them in this branch of their case, and I would dismiss their suit so far as it seeks relief on all points relating to the conversion of Juddins and their right to participate in the Charitable Funds and Institutions in the possession and under the management of the defendants.

I think I have dealt with every point of any importance raised by both sides. The transcript of the very excellent shorthand notes of counsel's address, taken down verbatim by the Court shorthand writer, Mr. Nakra, has been of great assistance to me in keeping before my mind every point argued before us by Counsel on both sides.

[His Lordship recorded findings on issues and went on :—]

The defendants throughout the hearing before us attached far greater importance to the question of the validity of their appointment and their right to appoint their own nominees in the place of their dying or retiring colleagues. The larger portion of the time occupied in the hearing of this suit was taken up by this part of the case. On this branch of the case the plaintiffs have succeeded. Although the plaintiffs have lost on the second branch of the case, they succeeded in defeating the defendants'

(1) (1896) 22 Bom. 430.

contentions based on the Statute of Fraud, the argument of which took up a great deal of our time. The questions raised in this part of the suit were of greater importance and by no means free from difficulty. The questions involved were bound to be raised sometime or another. It is very unfortunate that the suit is not so constituted as to settle these questions finally; but I think the Court's pronouncements on the questions raised will serve some useful purpose and may avert all further litigation. It has not been a secret from us that with the exception of the fourth plaintiff, who bears his proportionate share of responsibility as to costs, the whole risk and responsibility is on the sixth plaintiff. Having regard to the letters written to him by Mr. Jivanji Mody and Dastoor Darab and to the circumstances under which certain ceremonies were performed in connection with his wife, I do not think the sixth plaintiff has by any means been fairly treated. He has made an honest manly fight, and I feel that if he had to suffer in pocket it would be a very grave injustice to him.

Then as to the defendants' costs. Apart from the question as to whether they were wise in giving so much prominence to the fight on their right to appoint successors and trying to cling so tenaciously to the privilege of bringing in their own nominees, I feel that they were not personally responsible for the state of affairs as it existed before the suit. It was their predecessors who arrogated to themselves the right and conferred it on their successors and the late Sir Jamsetji, in the course of a discussion before us, told us that he and his colleagues would not have fought this question if they had not felt that the attempt to oust them was due to ill-will against them and made for the purpose of humiliating them before the community. This may have been an erroneous impression, probably it was erroneous; nevertheless, it was genuine and was communicated to us with a good deal of honest feeling. As trustees they have rendered valuable services to the community in the most disinterested manner, and their administration of the Trust properties has been absolutely faultless. They must have their costs as trustees.

My order as to costs would be that the costs of the plaintiffs, taxed as between party and party, and those of the defendants,

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taxed as between attorney and client, be paid out of the Charitable Funds in the possession of the defendants. If the plaintiffs and the defendants agree as to which Fund or Funds the costs should come out they should be paid out of such Fund or Funds. Otherwise the matter must be mentioned to us, and we will either decide the question or refer it to the Commissioner.

I cannot conclude this judgment without expressing my sense of obligation to Messrs. Lowndes and Strangman for the very valuable assistance they rendered to the Court during the hearing of this case.

BEAMAN, J.:—On the first part of the case, I am in complete agreement with my learned colleague. We had thoroughly discussed it, laid down the main lines of our reasoning upon every material point, and settled our conclusions before we separated in April. All that then remained to be done was to embody the results of these discussions in a judgment upon that branch of the case. I have only now to gratefully acknowledge the masterly manner in which my brother Davar has given methodized and exhaustive expression to our joint conclusions.

It was not, however, by any means clear, at the end of the case, that we were wholly agreed upon the various questions involved in the second part of the case. When I left India, in April, I did not feel prepared to adopt, in their entirety, what I then understood to be my brother Davar's reasoning and conclusions upon the rights of converts to Zoroastrianism to participate in the benefits of the Charitable Funds administered by the defendant trustees. It was therefore understood that we should deliver separate judgments on this head. But it was also understood that, in the time which must elapse before we could meet and deliver judgment, we would give unremitting attention to the principal points and to each other's views upon them, so that, if possible, we might, after all, avoid the necessity of any difference of opinion, even of pronouncing separate judgments. A considerable amount of correspondence passed between us, and since my return we have further elaborately discussed the whole evidence and every argument which has occurred to us, or been suggested to us by Counsel, for and against the right

of converts to participate in the benefits of the Funds. In addition to these personal conferences, I have carefully studied the elaborate second part of Davar, J.'s judgment; and while I am doubtful still whether we look at all parts of the complicated question eye to eye, it is a source of great satisfaction to me that I am able to agree with the main conclusion. Perhaps I am led to that result by slightly different trains of reasoning, but that is comparatively unimportant. I think I do not flatter myself when I say that the criticisms I freely offered have led to the modification of many parts of my learned brother's judgment, and have thus made it easier for both of us to take common ground and give to the principal question an unanimous answer. But I have felt, and I have understood too, that this was my brother Davar's wish, that I ought to add a few observations of my own, before disposing of the question which aroused so much feeling in the Parsi community of Bombay. I shall make those observations as short as I can; they will, indeed, take the form of a few supplementary comments upon Davar, J.'s judgment. My object will be to make it as clear as I can, in the fewest and simplest words, why I, too, hold that the Trustees were right in excluding converts from the benefits of their Trust Funds and Properties. But I hope that the relative brevity of my contribution will not be accepted as a measure of the time and thought I have bestowed upon the case. It would have been easy for me, in the ample leisure of my recent holiday, to have gone with the utmost minuteness into every detail: I refrained from doing so,—first, because I hoped that we might end by agreeing as substantially we now do; secondly, because I am sure, that the true ground upon which our conclusion rests is, while a very sure, yet a narrow ground, the character and limits of which admit of short and easy statement.

Before I come to that, I must deal with a preliminary legal objection which has occasioned my learned brother and myself much anxious thought, very grave difficulty, and—speaking for myself—real and serious doubt.

It arises in this way. In the Deed of 1884, the Trusts are declared for the benefit of all members of the Parsi community

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professing the Zoroastrian faith. Now, when those words were used, we must remember two things: First, they were used by an English draftsman, who surely had not the slightest idea—could not have had, unless prophetically gifted, the faintest premonition—of the use to which they would be put or the trouble to which they would give rise. No practical question had been raised about what did, or might, constitute membership of "the Parsi Community:" whether the qualifications were solely religious, or solely racial, or a mixture of both. The draftsman thought, as probably every one else thought at that time, that the Parsi community was a phrase of sufficiently precise and definite connotation; and that there never could be any question about the class denoted. Secondly, the qualifying words "professing the Zoroastrian faith" were inserted not to exclude converts *to*, but converts *from*, the Holy Zoroastrian faith. About that there can be no serious doubt; and, if not expressly admitted, it was impliedly admitted during the progress of this case, over and over again. The Parsis of Bombay were beginning to be exercised in mind over the cases of converts to Christianity; and they naturally wished to make it clear that no such converts, though originally of the Parsi community, would be allowed to share the benefits of the Funds and Properties.

So far all went well. It was only when the sixth plaintiff married a French wife, who openly professed the Holy Zoroastrian faith and was publicly and formally received as a convert into the Zoroastrian religious communion, that the jealous bigotry of the orthodox was aroused, and all the possibilities involved in the acceptance of such a fact began to be vividly realized. In the ferment which followed, the Trustees threw their weight on the side of local Parsi orthodoxy. Finally, they publicly announced, as Trustees of virtually the whole public religious establishment of the Parsi community of Bombay, that they would not extend the benefits of their funds to converts, or allow converts, the use of their places of worship and burial. Thereupon seven members of the Parsi community of Bombay obtained the consent of the Advocate-General and brought this suit

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with the object, *inter alia*, of getting a declaration out of the Court that converts were entitled to all the benefits of the Trusts administered by the defendants. There is no convert amongst the seven plaintiffs; for all the purposes of this branch of the case, their rights are fully admitted. And the defendants contend that they cannot maintain this suit for or on behalf of unascertained and undefined persons. Put in the simplest, least technical language, that is what this preliminary objection comes to. My brother Daver, after, as I have the best reason to know, very long and very anxious consideration, has been forced to the conclusion that the objection is well founded and that the suit, so far as this relief is sought, must fail. I need scarcely say that I entertain the highest opinion of my learned colleague's learning and ability, that his mature conclusions thus painfully reached must and do command my respect, and that should I feel bound to dissent from them, it would only be with the utmost diffidence and a lively sense that I am on extremely debateable ground. First, I want to clear the air of some high-sounding and justly-venerated phrases. Chief of these are, that no Court could, without abhorrence, decide against parties who have had no opportunity of being heard before it. Secondly, that even if we were to depart so far from fundamental principles of the administration of justice, the decision, if against the converts and in favour of the Trustees, would be utterly nugatory, as it would not bind those who were not parties to the suit. I may, I hope, humbly say that no Judge is more desirous than I am of doing justice—no Judge can be more sensitive than I am to any breach of sound judicial principle. And if I do not feel that abhorrence which I understand my learned colleague feels, at the bare idea of deciding this question on the present array of parties, which does not include a single convert, I think there must be a reason and a reason not very difficult to find. We must not, I think, allow reason to be drugged by sonorous phrases, or our judgments to be so overweighted by a splendid and time-honoured maxim, that we cease to be able to discriminate between cases in which it is, and cases in which it really is not, applicable. Sometimes it is not easy to correctly discriminate. It may as in the present case, need searching analysis. But, in every case, we

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must carefully scrutinize the actual facts, before we apply any wide generalization to them; and we must be sure, before we consent to do so, that the result will not be to defeat, rather than further, the true object, to attain which the generalization has been formulated.

Now, if I thought for a moment that by deciding in this case—and on the abundent materials which have with unremitting industry and consummate ability, been collected and laid before us—against the right of converts to share in these Trusts, there was the least, the remotest chance of doing injustice to any convert now in existence or yet to be born, I should go wholeheartedly with my learned brother, and say emphatically "I will be no party to such a decision." But are we not allowing ourselves, in making such a supposition, to be carried away by the sound of familiar words? Here we have wealthy and representative men of the Parsi community coming forward to fight for the right—a right which may fairly be treated as an abstract right—of all converts, present and future, to share in certain public charities. They spend money like water to have this question thoroughly thrashed out; they retain the most eminent men at the Bar; everything which human ingenuity can do is done to make out the strongest possible case for the converts. It is not as though any particular convert could have a case of his own. The question has to be answered by reference to matters finally settled before any person now living was born. It is as certain as anything in human affairs can be, that no convert yet to be made could have anything more to say to any Court on his own behalf than has been so ably said for the whole of his class (if it is strictly correct to speak of potential and future converts as a class), at the instigation and expense of these plaintiffs. If it were conceivably possible that at a future day some fresh convert were able to lay before the Court materials which have not been laid before us, that, I apprehend, could only be by the connivance and assistance of old Parsi families who at the present time belonging to the orthodox party, have intentionally kept those materials hidden from us. But that is so unlikely a contingency that, except for the purpose of re-enforcing an academic argument, it seems

to me that it might be wholly ignored. Now, I understand that my learned brother, who has felt the pressure of this argument so strongly, admits (for its limited purpose) that had there been one convert joined with the seven plaintiffs, the argument would have had the bottom knocked out of it and would have been utterly annihilated. If that is so, and it clearly must be, it is easy to show that the high ground it takes is, in fact and truth, utterly illusory and untenable. Let us suppose, for example, that one of the alleged converts of the lowest class had been made a party plaintiff—some illegitimate child of a Dubri woman. Is there any human being who can seriously contend that such an addition to the array would have strengthened the plaintiff's case, or made a decision of the Court, adverse to converts generally, less unjust to all reputable converts yet to be born and made? If it is abhorrent to any Judge's sense of justice to decide against parties who have not been heard, that abhorrence ought not to be capable of being so easily removed. Yet, for the purposes of this argument only, I repeat, it would have been completely and effectually removed, if, for example instead of making Sonabai a witness she had been made a party. What would have been the real, the substantial difference? Absolutely none. She has already told us everything she knows. She claims to be a convert; she has been examined and cross-examined. Because she is not a party, it is suggested that we should be violating the best traditions of justice by now deciding against the right of converts to share in these charities. If she had been a plaintiff, we might have come to the same decision on exactly the same materials, without a qualm. I confess that this seems to me hyper-sensitiveness. Again, it has been suggested that in the absence of a convert-party-plaintiff, we have no guarantee against this suit being, from beginning to end, collusive. How are we to know, I am asked, that this is not a deep plot, concocted between the plaintiffs and the defendants, to obtain a decision, barring the rights of converts? The short answer to that is that the learned legal gentlemen in charge of the plaintiffs' case are hardly likely to have countenanced, in the first instance, and to have spent themselves as they did in brilliant and persist-

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ent efforts to make good a collusive case, and a case which they must have known to be collusive. Of course, that objection is not seriously pressed against this particular case; it is merely brought upon the general question of principle. No one who has taken any part in this case, no one who has attended the hearings or read the reports really doubts for a moment that everything which money, talent, and energy could do has been done for the converts, far more than any one—or any dozen of them—could have done for themselves. So far, then, as there is any risk of doing injustice to persons not before the Court goes, I cannot, speaking for myself, treat that risk here seriously. If in any suit of this kind, joining single convert, would have enabled us to decide the question, and in the event of our decision being against the rights of converts to share in the funds would have made our decision binding on all converts present and future, I think, notwithstanding the impressive and imposing line of argument I have been dealing with, we might with the lightest hearts have held ourselves free to give the same decision, in a suit framed as this suit was framed, upon the materials collected by the plaintiffs, resting confidently assured that any number of actual converts added would not have helped us to a fuller or better and fairer understanding of the collective case or individual cases on which their joint or several claims rested. So, too, when it is contended that, if we were to decide this question in a suit constituted as this suit is constituted, our decision would not bind any one who was not a party to it, we must be quite sure that that is so, before we give such final and far-reaching effect to the argument; for this really begs the whole question. Concisely put, that question is: Whether this relief can be obtained, at all in a suit under section 539? Of course, if it cannot, then *cadit quæstio*; for this suit is under section 539, and under no other section. Obviously, then, if this relief is not of the kind contemplated by the section, we cannot give it in this suit. But this, though interlaced with the argument upon general principle which I have just dealt with, is really quite a distinct argument. It has to be faced. The point is subtle and difficult. No authority seems to cover it. If it should turn out that the relief is of a kind which might be sought and

awarded in a suit under section 539, then we do away at once with the second of the first-mentioned general objections; for an Advocate-General's suit under that section does, I apprehend, bind every one, and a decision in such a suit—that the Trust did not contemplate the admission of converts—would be final and decisive of the rights of all converts, present and future. And further, it must, I think, be admitted, that if this relief could be claimed in a suit under section 539, then the addition of a single convert to the array of plaintiffs would remove the last objection to the view that the decision in such a suit would bind all converts. But I have already shown, I hope, that that objection has no substance, is purely sentimental and academic —at any rate, for the purposes in hand; that the addition of a convert would not have thrown the millionth part of an additional ray of light on the vexed question—would, in fact, have been no more than a purely formal and deferential compliance with a most salutary principle. I shall in a moment have occasion to point out a much more substantial reason, than any reason of that kind could be for adding a convert to the array of plaintiffs, against doing so. But first let me consider very carefully whether the contention that no relief of this kind can be obtained in a suit under section 539 is sound. We heard a great deal during the argument about "rectification" and "construction." It seems to me to be hinted, if not clearly stated, that, while the rectification of a Trust Deed might possibly be asked in an Advocate-General's suit, Courts could only be asked to construe by persons who were directly interested in the construction they wished to get. Now, I do not think there is so much magic in the words "construction" and "construe," or any such sharply-defined distinction (for the purposes of this argument) between construction and rectification. However that may be, I am now more concerned to see whether what the plaintiffs really want the Court to do, is what the Court can do when a suit under section 539 is brought before it. It will, of course, be at once observed that that section, after an introduction containing very general words—as, *e.g.*, "whenever the direction of the Court is deemed necessary for the administration of any such Trust,"—goes on to say that the plaintiffs may obtain a

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decree for five specified objects, after which come the words "or granting such further or other relief." And it is, I understand, the opinion of my learned brother that the relief we are now concerned with does not fall within any of those five objects and cannot be included under the following words. Those, it is said, must be read as *ejusdem generis*. I confess that this is a most serious difficulty, and if my learned brother is right, as he very likely is, there is an end of the matter. I am not myself—and never have been—much in love with the *ejusdem generis* rule. It is too vague. If it means anything more than a tautologous re-affirmation of what has gone before, it must mean so very much more. What is relief of the like kind? Certainly not of a kind so like as to be practically identical. That would make the words mere surplusage. I should be disposed to think they meant such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in a suit of this kind. As, for example, removing fraudulent trustees, restraining a breach of the trust, and so forth. The words I have already quoted seem to me to be peculiarly applicable to the concluding words, "such further or other relief." "When the direction of the Court is deemed necessary for the due administration of the trust," then any person interested in the trust can come in and ask for such directions. Now what direction could be deemed more necessary for the due administration of such a trust as this, than a clear enunciation of the true scope and object of the Trust Funds and Properties? We have the beneficiaries divided on a question—and a very difficult question—of principle, namely, whether the Funds and Properties were intended for the use of converts. Some say they were, others say they were not. The Trustees took up a strong partisan attitude, and announced publicly that in their opinion they were not; and further declared that they will enforce that view, whether the rest of the community like it or not, by excluding all converts. Here is a fundamental question of principle affecting the whole scope of the trust. It is not really a question of the right of this or that convert, but so stated a profoundly religious question which may be assumed to lie at the root of all great public religious endowments. Any

person who believes that his religion enjoins proselytising, and wishes to spread it and make converts, might, it seems to me, without any undue straining of language, be said to be directly interested in ascertaining whether the monopolists of the whole local religious endowments were right or wrong in declaring that they would not allow converts, whatever the religion might say about it, to use those places of worship and burial, or to have the benefit of the Funds. Let us look for a moment at what would be the practical consequences of adopting the view which has commended itself to my learned brother. No suit for this kind of relief will lie under section 539. Very well. Then there are only two other suits possible: one, the ordinary suit; the other a *quasi* public suit under section 30. But those are private suits, in the important particular that the decision in them would not bind anyone who was not a party. Nor, as was suggested, do we derive any assistance from section 437. I will prove this shortly and conclusively. Let us suppose this case reversed. Let us suppose that the trustees had decided to admit, instead of to exclude, converts of every nation, caste, and creed. Now, there can be no doubt, I think, that any orthodox Parsi, who objected to worshipping with the so-called Bhangi converts, would have a very real and substantial grievance. But if he could not bring a suit under section 539, to get the matter set at rest, once for all, what must he do? He cannot use section 437, for *ex hypothesi*, as the most cursory perusal of the language of that section will show, it would land the suit in an *impasse* and a glaring *reductio ad absurdum*. We should have the trustees brought into Court to ask the Court to make them undo just what, in defiance of the sense of the community, they had resolved to do. The Trustees would want to let the converts in—the converts who could be the only defendants would want to come in; and yet the trustees (if that section is to be used) would have to ask the Court to order them to keep them out. This is plainly absurd. Then, are the aggrieved orthodox party to bring private suits? If they do, no convert is a party: it will be a suit between them and the trustees, and there will at once be a failure of the cause of action. If they add as many converts as they can find, still the decision will only bind the

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parties. And precisely the same if the suit is brought under section 30. There might not be more than two or at most ten converts alive. If they were joined under section 30, then of course they would all be bound by the decision. But the day the decision was pronounced, another half score of converts might be made, and the trustees might say: Well, we don't know anything of these people: they may have new and special claims; we are going to admit them; and so *ad infinitum*. The unfortunate orthodox party would have to be bringing suit after suit, till they and the trusts and all concerned were utterly ruined. Just the same if the case stands as it does now—there could be, there can be, no finality. Surely, it could not have been the intention of the Legislature to expose great public charities to eternal litigation. But if not, then it must have been the intention of the Legislature to have questions of this kind settled once and for all by a suit under section 539. If that was the intention of the Legislature, as I can hardly help thinking that it was, let me revert to the point whether it is necessary—or for that matter lawful—to join one of the unascertained X class, to establish the principle for which they represent the suit is brought, as a party plaintiff. The difficulty I adverted to, and which I still feel to be a real difficulty, pointing clearly to the true nature of a suit of this kind, is that a suit can only be brought under section 539 by a party interested in the trust—"any two or more persons having an interest in the trust." Now, it is clear that the object of the suit I am dealing with is to have it judicially determined whether converts *qua* converts (not whether this or that individual convert has any individual right) *are* or *are not* interested in the trust. To join them or any one of them as party plaintiffs would beg the whole question in issue. One section of the beneficiaries says converts are interested in the trust; another body says they are not. It seems to me that if that is a question proper to be agitated in a suit under section 539 at all, it must be agitated by persons who are admittedly interested in the trust, and are really fighting not for individuals but for a great principle of administration. These are some of the principal reasons which have led me—though, I have

already said, with the utmost deference and respect to my learned brother Davar—to dissent from his finding on this preliminary issue. I believe that we have the power, at the instance of the plaintiffs in a properly-constituted suit—as I also believe this for this purpose to be under section 539—to go into the question whether the Founders of the trust intended that it should be for the use of converts as well as those born in the Parsi faith.

I cannot help adding that I think it would have been better if the legal advisers of the defendants had pressed this preliminary issue on us for decision when the case began. They may undoubtedly well reply: "We took the point in our written statement; we raised it in our issues; what more could we do?"

But that is not such a complete answer as at first sight it appears. When the case opened, we had to listen, as the practice is, to the pleadings read at a great rate. These were immediately followed by a string of thirty-six issues—many of an involved and technical kind. These we had to take down as fast as we could, and in such circumstances it is utterly impossible for a Judge to take in the full significance, or, for that matter, a tenth part of the significance, of the case which is being made. Here, the moment the issues were down and before—speaking for myself—I had had time to give a thought to them, Mr. Lowndes got up, and, on behalf of the plaintiffs, protested against the practice of counsel for the defendants framing the issues and flinging them like this at the Court. He added that, in his opinion, there were really only one or two material issues (amongst which this one was of course not included) to which the attention of the Court need be directed. And he asked us to frame issues on these lines for ourselves and to neglect the thirty-six issues which had just been read to us. To this, my brother Davar—who has had very great experience at the Bar before he was elevated to the Bench—replied that all who frequented the Original Side Courts knew what the practice was; that it was well established; that defendants were always allowed the freest hand in framing issues; but that, as the case went on, a very large percentage of

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them dropped out and were never heard of again. All this time counsel for the defendants sat by and made no comment. And it was after this protest by Mr. Lowndes, and my learned brother's answer to it— an answer which, looking back on it, I think distinctly invited contradiction, if, as it has turned out, there were included in this long list of issues, issues other than those which Mr. Lowndes told us were the only material issues —that the trial began. Davar, J., had intimated that we might take it that many of these issues were in accordance with the usual practice, merely raised *ex majore cautela*. He had intimated that, as usually happens, we did not expect to hear more of a large percentage of them. We had had our attention drawn to all that the plaintiffs' counsel thought material. The defendants heard all this. They must have known that we did not realize that there was among these issues a very serious preliminary objection to going on with the suit on the understanding stated by Mr. Lowndes. Then was the time, it seems to me, for the defendants' learned counsel to inform us that, whatever might often happen, here there was a preliminary objection, not raised at all *ex majore cautela*, but an objection which the defendants contended would be fatal to this, which was, when the suit began, by far the most important part of the whole case. Had counsel told us then precisely what the nature of the objection was; had counsel insisted, as I think they ought to have insisted, upon our disposing of it as an issue of law *in limine*, we could have heard all that was to be said about it in a few hours, at the most, and have then given our decision upon it. Had that decision been in favour of the defendants, there would have been an end of the suit. For it is almost certain that at that time the plaintiffs would not have gone on with the issue dealt with in the first part of my learned brother's judgment, if the sixth plaintiff had known that the one question in which he was vitally interested could not be decided. Either the plaintiffs would have amended their plaint and got a proper array of parties, or the whole litigation would have been brought to a summary end. But the course which the defendants took has led, in the case of my learned brother—and might have led in the case of both of us—to this most unsatisfactory result. After spending

months of time and thousand of rupees; after inflaming the passions of the whole community and flooding the Court with unsavoury evidence; after squandering the moneys of the trust as well as those of private individuals who believed, and had every reason to believe, that the Court was enquiring into this question of the converts, we are told, that we really have no power to deal with that at all, and we are very likely told so quite rightly. Now, I do think that the Court has a right to expect that, when leading counsel are engaged in a great case, a point so vitally important as this point has turned out to be, shall not be kept in reserve for a single hour. I think we ought to have been told, the moment the issues were read, that the defendants confidently relied on this point; that the defendants relied on that issue as one that would prove fatal to the plaintiffs' claim in respect of the convert question: and that, being purely a legal preliminary issue, the defendants insisted upon the Court dealing with it *in limine*. As it is, the whole of my brother Davar's otherwise valuable and instructive judgment on this part of the case is merely *obiter*; and, of course, if he is right, any thing which I may have to add is *obiter* too. I cannot help thinking that this is deplorable. It may be the fault of the system, it may have been largely our own faults. I certainly do not wish to shirk any part of the responsibility which may fairly be mine. But it is clear that counsel and judges are very differently situated at the beginning of a heavy case. Counsel presumably know every in and out of it. Counsel know the strong and the weak points. A judge must come to every case with a perfectly open mind, and he is at a great disadvantage, where the case is extremely complicated, if counsel will not help him in every way with the utmost candour.

Having now partially cleared the ground, I will deal as shortly as I can with the main question. To understand the question itself and the manner of its development before us, we must turn again to the Trust Deed of 1884. Here, as I have said, the trustees declare themselves to be trustees of practically the whole public religious establishment of the Bombay Parsis, for the benefit of "members of the Parsi community professing the Zoroastrian faith"; and later, when it was sought to introduce

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a foreign convert, they construed the terms of that declaration in such a way as to exclude from the benefits of their trust all who were not born of Parsi parents or who did not come within the definition of Irani Parsis; and further, they limited Parsi parentage to the father, thus excluding children of a Parsi woman by a foreign father. To this the plaintiffs demur. They contend, in the first place, that the trustees have wrongly declared the Trust in the phrase I have quoted; in the next, that if that phrase correctly declares the scope and objects of the trust, the defendants have wrongly construed it. The plaintiffs say that the phrase may be unobjectionable in itself, but its real meaning includes all who become members of the Parsi community by conversion and thenceforward profess the Zoroastrian faith. In other words, that the Parsi community means nothing else, and consist of no other persons than those who profess the Parsi or Holy Zoroastrian religion. And the plaintiffs propose to prove this contention by leading evidence of the practice from old times of the Bombay Parsis in this respect, as well as any and all evidence throwing any light upon the true intention of the Founders of these Trusts at the time of their foundation. This course was at once and strenuously resisted. The defendants contended that the Statute of Frauds was a conclusive bar, and that the plaintiffs could not go behind the Deed of 1884. I may say at once that my learned brother and myself fully discussed the elaborate arguments which were addressed to us for days together on this point. We have read and duly considered all the authorities. And long before the case ended, we were agreed that the defendants' contention was unsustainable. I shall content myself with saying now that I entirely concur in what has fallen from my learned brother in disposing of this objection. He has expressed—admirably if I may say so—our joint views, with the principal reasons upon which we rest that part of our decision. I would only add, avoiding technicalities and using the simplest words, that where a body of persons solemnly declare in a formal Deed that they hold properties and money on trust; where they further declare the objects of that trust, as they understand them; where they are in possession of whatever documentary evidence there may be accompanying the foundation

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of the trust and showing what was the intention of the Founders, it appeared to me, and still appears to me, preposterous that they should seek to prevent the Court from obtaining, whencesoever it can, by parol or writing, proof of what the Founders of these trusts really meant. The defendants say they meant one thing: the plainsiffs say they meant another. The defendants say that the plaintiffs may not prove their allegation because of the provision of section 7 of the Statute of Frauds. In effect they say: We are the final authorities by reason of that Statute: we are the only people who can now decide what the object of the settlors was. There is nothing in the case law, as far as I can see, to warrant such an obviously perverted application of the Statute of Frauds. So applied, it might well, indeed, be called a Statute of Frauds: not as a Statute to hinder, but to further, fraud. In my opinion, the Statute—or, let me say, the section of the Statute on which the defendants rely—is no longer applicable, if it ever was applicable, to this country. And I am also quite clear that, even if that section is applicable, its requirements are amply satisfied on the authority—to cite one case only—of *Rochefoucauld* v. *Boustead*[1], by the facts of the present case. I have not and never had any doubt that the course proposed by the plaintiffs is not only a proper course, but the only course we ought to follow. We have to decide—if we have to decide anything—whether the trustees have rightly understood and given effect to the objects of those who entrusted the properties and moneys to their keeping. How are we to do this, if not by searching exhaustively into the past, and weighing whatever evidence may be there found throwing light on the intentions of the Founders? The defendants avow themselves trustees, and it is not for the trustees, who are virtually charged with—as I understand it—a breach of trust, to shelter behind the Statute of Frauds and say to their accusers: "You may not prove anything at all behind our own construction of the trusts committed to us." Doubtless, having brushed aside a technical bar— which, I think, should never have been interposed—we are still to be strictly guided by the rules of evidence. We are not

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so to extend our enquiry as to take in mere hearsay, or any matter which ought not to be the material of proof in a Court of Law. That is a distinction which, after our interlocutory ruling on the technical plea, seemed to me to be ignored and to have given rise to some dissatisfaction in the minds of those learned gentlemen who had the onerous and responsible duty of conducting the defendants' case. And in many instances I, speaking for myself, felt that we were going much too far afield, and encumbering our record with what was not, strictly speaking, evidence at all. But my learned colleague thought, that, in a case of this kind, we should always err—if we must err—on the side of liberality. And very likely he was right. It is after all easy, when a case is finished, to sift out the good from the bad evidence. It is not so easy to do this in the stress and heat of the actual enquiry. If, on close examination, our record shows that we have let in a good deal of useless, or even irrelevant matter, I am sure that my learned brother's able and exhaustive judgment will show that we have not given any weight to that portion of the evidence.

Starting, then, from the *causa causans* of this litigation—the words of the Deed of 1884 and the subsequent construction put upon them, the plaintiffs' case—put summarily and syllogistically, as I understand it—is, all these trusts are public religious endowments and charities. They were founded not for racial or tribal, but for religious purposes. The founders *ex hypothesi* intended them—since they are not only part of but virtually the whole public religious establishments of the Parsis—for the benefit of all professing the faith of that community. Who, then, profess that faith? Can it be said that only those who are born in it profess it? Certainly not. For we can easily prove (and this has since been admitted over and over again before us) that the Zoroastrian religion was originally a proselytising religion; that its tenets not only permit but energetically enjoin the making of converts. It, therefore, follows that, where a religion notoriously enjoins conversion, and where devout members of that religion found public places of worship and burial for the use of those who profess that religion, they must have contemplated—they must be deemed to have contemplated—

converts to the religion participating in the benefits of such endowments. Any other view leads at once to this practical absurdity, that you have a great religion ordering conversion, and yet refusing to allow converts any lot or part in its public religious communion.

That is, I believe, a fairly accurate statement of the plaintiffs' main argument. It is an extremely powerful and convincing argument. For many months, reflecting over the whole case, I was inclined to accede to it. I was greatly pressed by its simple logic. And I may add that I do not think it gained anything from the oral evidence which was led by the plaintiffs to supplement it, and to show that not only was this conclusion *à priori* irrefutable, but that the practice of the Community was consistent with it. The *à posteriori* line of demonstration almost at once showed signs of inherent weakness; these rapidly accumulated, till the able and indefatigable counsel for the plaintiffs himself awoke to the rather obvious pitfalls in his path, and appealed to the Court to help him to decide whether he should go on with this kind of evidence. We, of course, could say nothing; and Mr. Lowndes rather abruptly stopped calling his convert evidence. That evidence has been fully dealt with by my brother Davar. With the exception of one or two semi-mythical cases—as, for instance, the Habshis—it must be perfectly plain to every one who heard the evidence given, or who has taken the trouble to study it since, that it had nothing to do with conversion in the sense in which we are asked to deal with that question. Admitting illegitimate children, or, for that matter, adopted waifs—to put the most charitable construction possible on some of the instances—into the Parsi faith and communion, is altogether different from allowing adult conversion from one faith to another. By far the strongest instance was that of Sonabai. And even if we concede that all those who have given evidence about her have told the truth, and nothing but the truth, what does it amount to? She may have been smuggled in infancy into a Parsi family, and brought up as a daughter of the house, duly invested with the Sudra and Kusti, and married to a Parsi. Thenceforward she may have been allowed to worship in the Fire Temples. But who was to know anything about her real origin?

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Having regard to the rest of the evidence, it becomes only too plain that illegitimate children of Parsi fathers were in the same way smuggled into the Community, especially in the mofussil, where the Parsis were scattered and under little or no communal control. If any orthodox Parsi, after Sonabai was grown up, had entertained suspicions, he would probably have quieted them by assuming that she was a natural child of her adoptive father. There was too much dirty linen of this kind, in too many reputable Parsi families, for any one to be over eager to wash it all in public for the sake of a doubtful principle. As to what happened when Sonabai came to Bombay to give evidence, the same considerations apply. I do not doubt she did frequent some of the Fire Temples in Bombay. But, dressed as a Parsi woman, who was to know anything about her? I do not say, of course, that had the priests known, they would at once have turned her out. That would be going too far yet, and begging the question raised by this part of the evidence. For the plaintiffs' case is that because she was a convert, she was allowed free access to the public places of worship. All that I can yet feel justified in saying to that is that I do not see how any one was to know whether she was a convert or not. It would, of course, have been different had she, before entering, announced herself as a Hindu converted to Zoroastrianism. But nothing of that sort is alleged. Suppose we in England were as strict as the orthodox Parsis in Bombay are, how could anyone in, say, St. Paul's Cathedral, know whether every quiet and orderly member of the congregation had the requisite qualifications? I consider the whole of the oral evidence touching alleged conversions in Surat and other places utterly worthless. No doubt, had it been possible for the plaintiffs to prove a well-established custom in conformity with the precepts of their religion, of making converts and admitting them to full religious communion, this would have done them great service. But the failure to prove this does not, in my opinion, do them anything like proportionate disservice. Indeed, I think too much stress has at various times been laid upon usage. I thought from the first that when the plaintiffs had established the propositions,—(*a*) that the Zoroastrian religion

enjoined conversion, (*b*) that the properties and funds in suit constituted virtually the whole public religious establishment of Zoroastrianism in Bombay, it lay rather on the defendants to show that converts were not entitled to participate in the benefits of that establishment. But the plaintiffs went cheerfully on at once to try to convince us that many converts had, from time to time, in comparatively recent times, been made and admitted to the Temples and Towers. So far from proving anything of the kind, all that that evidence has revealed is that many mofussil Parsis kept alien mistresses, had illegitimate children by them and brought up those childern as orthodox Parsis. Now, the defendants have admitted all along that the bastard children of a Parsi father are eligible and may be admitted to the Zoroastrian communion. So far, then, as the oral evidence goes, the plaintiffs were very soon seen to be beating the air. It is true that this evidence was meant to prove conversions in the proper sense of the word; but no one can seriously contend that it does do so. What the defendants deny is the right of any foreign convert, in whose veins no Parsi blood runs, to become a member of the Parsi community, and as such to share in the benefits of their public religious and charitable endowments. And I cannot say that the oral evidence discloses any instance of the kind contemplated, or any instance remotely resembling it. Again, I must insist upon the distinction between conversion of the kind we really have to deal with, and adoption in infancy. One solid reason is that while, in the first case, all the circumstances would be at once known, in the second, it must always be a matter of real doubt whether the adopted infant was really of foreign extraction or an illegitimate child of a Parsi father. And when we are asked to decide whether converts *qua* converts, as distinguished from bastard children of Parsi fathers, are entitled to share in these trust properties, such evidence as the plaintiffs have offered us—oral evidence, I mean—is seen at once to be utterly valueless. This is not necessarily so when we come to consider the documentary evidence. That stands on quite another footing. But, while I think of it, I will shortly deal with one point which seems to have obtained undue prominence at some stages of

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this long litigation. I may be wrong, but I think the defendants relied, and strongly relied, upon what they called the long, uninterrupted, and uniform usage of the Parsis in India to the contrary. And, speaking here with the utmost deference and respect, I think that that consideration had some weight with my learned brother. With me it carries absolutely none. What is the position? The defendants admit that their religion enjoins the making of converts. But they say that, since the Parsi emigration from Persia some twelve hundred years ago, the Indian Zoroastrians, commonly known as Parsis, have never carried out that religious precept. And they rely on the absence of all conversions, in the proper sense of the word, to prove a custom abrogating one of the fundamentals of their religion. In this connection, reference will probably be made to a case decided by Scott J. some years ago, in which it was held that long-established usage overrode the canon law. The Zoroastrian religion forbade, as the learned Judge held, infant marriage. But the Indian Zoroastrians were shown to his satisfaction to have uniformly practised it. He accordingly decided in favour of infant marriage. That no doubt was a very proper and just decision in the circumstances of the case. But how does it bear on this question? I do not think it has any bearing at all. There is a perfectly plain and intelligibe distinction between a positive or affirmative, and a so-called merely negative custom or usage. The latter is not, in strictness, a usage or custom at all. It is, as soon as the proposition is fairly stated, clearly absurd to reason from mere non-use to the contrary affirmation. The Zoroastrian religion enjoins making converts. But for many years we have not made converts. Therefore, although we still profess that religion and revere all its essentials, we rely on a custom of not making converts, to abrogate the positive commands of our religion. That is what the defendants would say on this point, and it only needs to be stated to be set aside as absurd. There cannot be a custom of not doing a thing. Circumstances may have combined to render it undesirable or impossible, and so a practice may have fallen into desuetude. But as long as the cardinal dogmas of the religion itself have remained unchanged, their efficacy, where, as here it is freely admitted, cannot be

impaired, much less destroyed, by inability or unwillingness to obey them. It is as much the duty of every pious Zoroastrian to-day to make converts as it was in the remote past. As a general abstract proposition, I think that is self-evident.

Now, let us look a little closer into the origin and justification of the alleged negative custom. The most orthodox, the most bigotted, champions of the defendants' case are agreed here. We did not make converts, they say, since we came to India, because we could not. That naive explanation is, of course, perfectly true. But what of its effect upon the use to which this inability is now sought to be put? Look at the facts. The Zoroastrians were expelled from Persia, or fled from Persia, before Mahomedanism. Those who reached India were a scattered remnant. They were only too glad to receive an asylum, to be allowed to live in peace and profess their ancient faith. In such circumstances, the idea of proselytising was impolitic and impracticable. They had enough to do to preserve their own faith, their own little society, against the impact of great surrounding forces (which, if not actively hostile, were not altogether sympathetic), religious and social. The danger which the early Indian Zoroastrians had to face, was the danger of being absorbed into the masses among whom they sojourned: their chief care must have been to maintain the purity of their own faith and the traditions of their own people. Any attempt at proselytism in those days would have invited reprisals. It would have been—regarding them as a body politic—politically suicidal. They were the strangers: they were the weak and broken fugitives. Of course, they did not seek to make converts: all they desired was that their own people should not be converted. Because, under these conditions, there is no trace of any proselytising actively for centuries—until, owing to the influence of many other evident causes, the essentially religious had been superseded by an essentially caste spirit when another and equally potent explanation begins to emerge—no inference can fairly be drawn that a local custom against making converts had grown up.

Yet, in the records and documents before us, there is ample evidence, I think, to show that although no practical effect was

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given to it for reasons of policy, the idea of conversion was quite familiar to the whole Indian Zoroastrian community and frequently formed the subject of elaborate references, hypothetical cases, and controversial treatises. I shall have a word or two to say on that later. I will now dismiss the point I have been discussing with this observation, that while the absence of any well-accredited instance of a genuine conversion has, in my opinion, little or no bearing—as usage or custom negativing the canon law—on the plaintiffs' *a priori* case, the fact may, and probably will, give rise to considerations of some importance when we try to ascertain what the intentions of the founders of these trusts were at the time they founded them. And this clearly invites a precise statement of *the real question we have to answer. That question is not, whether the Zoroastrian religion permits conversion, but whether, when these Trusts were founded, the Founders contemplated and intended that Converts should be admitted to participate in them.* Too much stress cannot be laid on this, because the first question really does not arise, while the second is the only question that does arise on this part of the case. It may at once be said that the Zoroastrian religion does admit—even does enjoin—conversion. That cannot be and has never been categorically denied. It is true that the so-called learned men who have come before us to support the defendants' case have wasted hours of our time in puerile attempts to gloss away the plain letter of the law. But that must be attributed partly to invincible bigotry which proverbially dulls the sharpest wits, and partly to a natural stupidity and want of training in clear thought, which prevented witnesses of the type of Mr. Modi from disentangling his own ravelled thoughts and opinions. Passing over these interminable silly sophistries, and admitting that Zoroastrianism enjoins conversion, we are only one step—and that not, in the result, a very important step—on the way to our conclusion.

Here I will take up another point which occupied days and days, seemingly turning on the connotation of the words Parsi and Zoroastrian, but really going deeper, and touching the root of the whole matter. Put shortly, the plaintiffs say that Parsi is a term of primarily religious connotation, the defendants that it

is a term of primarily racial or tribal connotation. We were referred to dozens of books, not a passage in one of which helped or could have helped to an intelligent solution of the difficulty. Everyone speaking loosely knows the facts, as well as everybody else. When on those facts a peculiarly subtle question arises, which was certainly never present to the minds of any of these amiable savants and travellers, their casual and unconsidered use of this term or of that is in iteslf worthless, while such observations as some of them made upon scraps of custom, never rise above the level of the ordinary traveller's tale. The case had been much better, not to say shorter, without that mass of pedantic rubbish. The Indian Parsis, as everyone admits, came to India from Persia. They were soon locally designated Parsis, because they came from Fars, or Pars, or Persia. Applied to them by the peoples of India, this term simply denoted place of origin. They would not have called themselves Parsis, any more than at first their fellow Persians who had not come to India with them would have called them Parsis. And in this connection it is interesting to note that, in the twenty to thirty passages referring to these properties which have been discussed at great length—early dedications by the Indian Zoroastrians themselves—the word Parsi does not once occur. In all probability, Parsi was a name which no Parsi would have recognised or thought of applying to himself or his people in any special tribal or national sense, when first their exiles landed in India. Then the question arises whether, at that time, it could have any meaning for the community, whether it signified any national as opposed to religious bond? I should say probably not. And it is just here that the significance of the contention dives below the surface verbal definition to the root of the matter, namely, had this body of exiles any common distinguishing bond, marking them off from others and constituting them a peculiar people, except the bond of religion? When they landed in India they were the only people in all that vast and teeming Continent who professed the Holy Mazdiasnian faith. Was it not the profession of, and adhesion to, that faith which consolidated them and made of them a separate people? Or were they a separate people because, in the loose

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geographical notions of those who were not of their faith, they had come from Pars? Looked at from either point of view, they were foreigners. The outsider might have chosen to label them, for purposes of identification, by a term denoting their place of origin. But what did they themselves regard as their bond of union? Was it the religion for which they had fought, and been exiled, to preserve which they had sought refuge in a strange land, just as the Pilgrim Fathers carried their religion to the free air of America; or was it some national or tribal sentiment, originating in and inseparable from the place of their birth? The answer to this, in those remote times, is, I think, clear and certain. What feeling of patriotism could have survived? There are still, and there then were of course, numerous Zoroastrians in Persia. But amongst themselves, Indian Zoroastrians do not call them Parsis, but Iranis. The fact that the Indian Zoroastrian immigrants were, rightly or wrongly, supposed to have come exclusively from the Province of Fars, amply accounts for the fact that the people among whom they settled labelled them Parsis. But we are concerned now rather with the way in which they regarded themselves. They owed no allegiance to any Persian King: they had no special civil or religious rights as Persians: they had no special political characteristics as Persians—less still of course merely as men from Fars. What they did have was a very special, elevated, and ennobling religion—their own exclusive religion as far as India was concerned, in the practice and profession of which they stood apart from all the alien races by whom they were surrounded. They were in much the same case as the Jews—a peculiar people, with no country of their own, no separate national life of their own, owning allegiance to no Parsi or Zoroastrian temporal sovereign, guests on sufferance of races, of peoples, who had nothing whatever in common with their religious organization. They did not know themselves, I have no doubt as Parsis, in any national sense, if in any sense at all, but as members of the Zoroastrian community in India. And if that is correct, does it not follow that the original bond of union between these settlers was the bond of religion, not of nation? Here we must not forget that while there may be a plain absence of anything

like what we understand by National or Patriotic feeling, its place is not infrequently taken by a tribal feeling. And it may be contended that, while the first immigrants of the Zoroastrian faith were united primarily by a common religion, they were also united as a tribe, which was a tribe because it remained the sole repository of the one true faith. And once the tribal sentiment comes into being, it cannot be doubted or denied that in appropriate circumstances, it will develop to a degree of exclusiveness exceeding anything which is truly national. That is a consideration which must not be lost sight of and may be noticed later. But it is probably incorrect to describe the first Zoroastrian immigrants as a Persian or even a Zoroastrian tribe. So far from that being the case, they were the shattered remnants of a great nation. Usually what has had a complete and national organization on a grand scale does not on disintegration, break up into tribes. We have no Greek, or Roman, or Peruvian tribes. But here again it may be necessary to distinguish between the integral factors of the whole national Unit, to see whether the predominant factors are temporal or religious. In the latter case, the break up of the Nation or Empire—its overthrow by infidels or barbarians—might force those who survived and still regarded their old religion as their chief national treasure to carry it off with them, and, where the environment required, constitute themselves a kind of tribal guardians of this sacred possession.

The importance of applying a searching analysis to the use of the terms Parsi and Zoroastrian from the earliest times is obvious. If, as the plaintiffs contend, Parsi means—and never at any time meant anything more than—a person professing the holy Zoroastrian faith, then any person professing that faith, and formally admitted into it, would *ipso facto* be a Parsi and a member of the Parsi Community. Such a person would, under the express terms of the Trust Deed of 1884, be entitled to share in all the benefits of these Trust Properties. If, on the other hand, Parsi means something more than this, if it means one of the tribe of immigrants from Pars, then it follows that mere conversion to Zoroastrianism will not make—say, a Frenchman—a Parsi, or entitle him to be considered a member of

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the Parsi community, or to share in the benefits of these Trusts. In the latter case, the plaintiffs fall back upon another, and really a much stronger, line of argument. They say that the insertion of the words "members of the Parsi Community, etc." in the Deed of 1884 were unauthorized and at variance with the intentions of the founders. I have already observed that those are the words of an English draftsman who could not possibly have foreseen the trouble they were to cause. I have said that they were chosen to exclude converts from, not converts to, Zoroastrianism. And I do not think that, in view of the plaintiffs' second line of attack, they really need the elaborate verbal criticism which has been spent over them. But I do think that the underlying contention is fundamental, namely, that mere conversion makes a man or woman a full member of the Parsi—or call it if you please Zoroastrian—Community, and entitles him or her to all the benefits of the Trusts instituted for the public religious worship of that Community. I think that the words in the deed are not very important, because when we turn back to the earlier documents, we shall find that the Founders of all these trusts never used the word Parsi, but invariably spoke of Zoroastrians, those of the good Mazdiasnian faith, or members of the Holy Zoroastrian Community, and so forth. And the real question is not to distinguish between the modern connotations of Parsi and Zoroastrian, but to ascertain what the founders meant when they dedicated these properties and moneys to Zoroastrians or members of the Zoroastrian Community. Still I have thought it right to point out what I conceive to have been the true origin, connotation, and application of these terms, when they first appear side by side. In my opinion, Parsi was first used by outsiders to describe to each other—by reference to the place of origin—this strange new people. Outsiders could not, of course, have known, and presumably cared little, about the religious tenets of such immigrants. They were foreigners, and they came from Persia. Enough then to describe them as Parsis. Among the Parsis themselves the case was altogether different. They had no reason to be proud of their place of origin, they had nothing to look for from Persia. But they had their religion. They were

first and last Zoroastrians, irrespective of the fact that persecution had driven Zoroastrianism out of Persia. As time went on, no doubt the tribal sentiment grew and throve, and there was super-imposed upon the first simple bond of a common religion, the bond of a common tribal descent. So that, as the community prospered and acquired wealth and importance, it accepted the popular name of Parsis, as though it really were a national or tribal distinction. And along with this secularizing process, went a corresponding weakening of the original religious tie, so that, I dare say, it is quite true to-day to say that it is more accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organization—than it would be to define them as men and women professing the Holy Zoroastrian faith.

And that makes it the more unfortunate that the Trust Deed of 1884, drafted by an Englishman, should be expressed as it is. For, when we come to compare it with the earlier documents, one thing is plain, that whether the defendants have put the right construction on disputed words or not, those words ought not to have been used. It would have been much better to follow the language of the founders at the time they dedicated these trusts to public religious uses. Had that been done, we should have been spared a great deal of refined, and on the whole, profitless argument, and we should also have been spared the useless labour of following counsel through dictionary definitions, and the tales, opinions, and gossip of more or less well qualified savants and travellers.

If I were to find that it was the intention of the founders of these trusts using the words "for the use of the Anjuman of the Zoroastrian Community" or "for all those of the pure Mazdiasnyian faith," and so on—to include in their benefactions genuine converts to Zoroastrianism, then I should not feel the slightest hesitation in saying that the Trustees had no right to substitute for such words popular language like "the members of the Parsi Community," still less to construe those popular terms in such a way as to exclude persons whom the founders meant to include.

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Before going on further, right into the heart of the matter, I may as well clear away some possible confusion. When we were engaged upon the evidence offered to prove that converts were frequently made, some discussion arose as to what constituted a convert, or, in other words, whether any specific ceremonies were necessary. As the case went on, it became more and more clear to my mind that too much attention was being bestowed upon this point. When it was first suggested, the defendants at once uncompromisingly refused to go on with it. They told us, in the plainest language, that their case was converts or no converts. They did not care to go into distinctions between the making of this or that convert. Conceding that a convert was made in the most approved and perfect manner, they still denied that he was entitled to the benefits of their funds. For my part, I at once, and finally, accept that position. It is simple and reasonable, and it shuts the door on what might have been long enquiries into ancient ritual that appeared to me likely to lead to no good result. It cannot, however, be denied that, while everyone admits that, theoretically, the Zoroastrian religion enjoins the making of converts, the leading "experts" for the defendants, from the time of the Select Committee's report, have endeavoured very strenuously to introduce certain qualifications. The most general of these has, strictly speaking, nothing to do with this point, though it is apt to be confused with it—I mean the condition upon which all these religious leaders insist, that such conversions should not do harm to the good religion. That is an opportunist gloss upon sound religious doctrine which, I think, a sound Churchman would find it hard to defend upon any but the plainest secular grounds of expediency. The fact that it has gained and held the prominence it has throughout this case, is a convincing proof, if any were needed, of how completely the pure religious sentiment has been subordinated to the caste or tribal sentiment of the present day community. Further than this, however, strenuous efforts were made at various stages of the case to convince us, that no conversion could be a real effectual conversion, unless the convert went through certain ancient, ceremonial, and purificatory rites. Now, I do not propose to go

into that question at all. We have here a very simple issue. The defendants say, let your convert be converted and admitted in any way you please; impose upon him the strictest ordeals known to your ritual; and we still say that he is not entitled to share in the benefits of our trusts. That being the defendants' position, it is superfluous to go into the question what constitutes a valid, from the religious stand-point, conversion. But I cannot refrain from making one observation. The extreme orthodox party, who are most jealous of the prestige and exclusiveness of their community, appear to think that were this a question for us to decide, we ought to lay it down that what is called the nine nights' Burushnum ceremony is indispensable. And in adopting this line, I have not the slightest doubt they are honestly actuated by zeal for their religion and the desire to keep it as select and unpolluted as possible. But, surely, they must see that they are taking a mistaken course. If that were an indispensable condition precedent of conversion, the only practical result would be to throw the door open to the lowest, least refined, least desirable class of converts, while shutting it in the face of all reputable persons who, out of sincere conviction, desired admission to the Holy Zoroastrian faith. I find it difficult to believe that any cultured adult foreigner could bring himself to submit to this extremely primitive ceremony of initiation, while certainly no grown cultured woman, who wished to join the Zoroastrian faith, could conceivably be asked to do so. It is only people in the lowest stages of development who could be at all likely to consent to go through such an initiation, and those are precisely the kind of converts zealous Zoroastrians do not wish to make. Everything, therefore, in the record which deals with degrees, if I may so style it, of conversion—every question and answer about what ceremonies are necessary and what ceremonies are unnecessary—seem to me now to be wholly irrelevant. I shall not say another word about them.

I have now to make one or two remarks upon the documentary evidence relating to conversions in the past. We have three leading instances: (1) the Pandits, (2) Akbar, and (3) the Mazagon converts. The first is, more or less, mythical. I do not think I

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can go quite so far as my learned brother in disposing of it. He attaches more weight than I am able to do to the learning and researches of Mr. Modi. I can only say for myself that such additional researches as he made, while the case was in progress, served no other purpose than to convince me that his mind was so obsessed by the cause he had at heart, that he was utterly incapable of reasoning or even thinking correctly. Of course, it is possible, as my learned brother suggests, that these Pandits were Parsis; or that if they were not Parsis, they were good men who had helped the early settlers, and were therefore remembered in their prayers. Those are quite possible explanations. But taking the evidence about them as it stands, I should have been inclined to say that it did show that these Pandits became Zoroastrians. But the time is so remote that the point has little practical importance. It may amuse the curious, it may interest the scholar, but it does not, I think, throw much light on the question we have to answer.

There seems to be a pretty deeply-rooted and widely-spread tradition among the Parsis that some of the Navsari priests went to Akbar's Court and converted him. Whether he really was converted or not has, of course, only a secondary and comparatively unimportant bearing on the present case. But there is a good deal in this connection which does directly bear upon it and is not unimportant. We have to bear in mind that the defendants' case is, that conversions in India, since the Parsi immigration, are altogether unknown. None, they say, have occurred. We have never tried to make any. And the practice, enjoined by the founder of our religion, has fallen into total desuetude. That is one thing, and as a reply to it, the fact that Akbar was converted, if he was, would be a telling reply. But we have to carry this line of opposition further, as I have already indicated, when we come to consider, after preparing the way carefully, the cardinal question: "What had the founders in their minds when they created these trusts?" It would help the defendants greatly to be able to say—as, indeed they do say with dogged insistance—that not only were no conversions ever made, but that the idea of making converts never occurred to any of the Indian Zoroastrian Community,

and it is in answer to this that the evidence about Akbar is so important. For what do we find? Not only, as I have said, a widely-spread tradition, popular ballads, extolling the achievement as the crowning glory of the Bombay Parsis, but Mr. Mody himself—the most bitter uncompromising opponent of conversion, the root and branch representative of orthodoxy—even he writes an elaborate treatise, or, one might say, almost a book, to prove that the priests of Navsari are fairly entitled to the credit of having converted the Emperor Akbar. After making all possible allowances for priestly *esprit de corps* and for the exuberances of learned authorship, I cannot help thinking that this leaves Mr. Modi in a delicate position. When, from time to time, in the course of his cross-examination, he was confronted with his own written and published opinions, I think he must have bitterly regretted that he ever set up to be a learned author. Not only in this instance, but in many others—right up to the time when the storm broke, Mr. Modi, with guileless indiscretion, went on committing himself to opinion after opinion, from all of which he had of a sudden to resile, with almost startling agility and vehemence! That is one of the many misfortunes of being a popular author. Of course, when Mr. Modi was writing these books and expressing as a recognized sacerdotal authority—these opinions—he allowed himself to be carried away by the impulse of the moment. Engrossed in the fascinating task of flattering the vanity of his co-religionists, he expends his learning and talents in a brochure proving that certain godly priests of Navsari converted Akbar, or, at any rate, if they did not quite convert him, certainly no one else did, and they, at any rate, were entitled to all the glory and credit of the attempt. I will not say that Mr. Modi had not the honesty—because like many other worthy fanatics he is probably as honest as he is perverse on his particular hobby, but I will say that Mr. Modi had not the wit—to take the only possible course by which he could have extricated himself from the embarrassing consequences of his too exuberant authorship with dignity and credit. Instead of telling the simple truth, that he had taken up these subjects without the least idea that they would ever have more than a scholarly and academic interest, and committed himself

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to opinions which, when brought to the test of a shattering concrete case, he could no longer maintain, he made the most pitiable efforts to show that he was perfectly consistent with himself, and that his "Yea" of to-day was his "Nay" of yesterday. I suppose few witnesses of equal eminence, character, and I hope, I may add, sincere honesty, have made a more deplorable exhibition of themselves in the witness-box than Mr. Modi. But the point of all this is, not whether Akbar was or was not converted a century or two ago, but that right up to the present time one of the leading scholars and ecclesiastical lawyers of the Parsi community of Bombay, so far from saying that such a conversion was contrary to the tenets—or, for that matter, the practice of the community—set himself elaborately to appropriate the merit of, let us say, the attempt to convert Akbar to his own co-religionists. Two most important facts emerge: (1) that the idea of converting aliens had not become extinct; and (2) that some, at least, of the religious leaders of the community regarded it favourably within a very short time of this controversy breaking out.

The case of the Mazagon converts is useful for the same purposes. It is, in my opinion, quite immaterial to enquire whether they were converted, or, for that matter, whether they were capable, in the broad general sense, of becoming converts. It may be that they were all illegitimate children of Parsi fathers. What is important and material is, that in their case, in quite recent times, two eminent Parsi Divines engaged in a heated controversy as to what ceremonies were, and what were not, essential to conversion. This shows, again, with convincing clearness, that conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time. Scattered about the voluminous papers which have been laid before us, there is plenty of evidence to support this view. In the case of one alleged disreputable convert, we find the leaders of the community objecting, not on the broad ground that no conversions could or ought to be made, but on the much narrower ground that his conversion had not been notified to the Anjuman or that the proper ceremonies had not been performed. Again we have the Ravayats or *Responsa prudentium*. These are

answers sent by the heads of the Zoroastrian community in Persia, to questions put to them on points of religious dogma, ritual, and so forth by Bombay Parsis. Both questions and answers show, with unmistakeable clearness, that the question of making converts,—both in the abstract, as a general question, and, more concretely, as to who were fit and proper to be made converts and how they ought to be made—was very much alive over the whole period to which we need confine our investigations. It is true that the Ravayats may not command much respect. That is not the point. The point is that questions were put by pious men about conversion, and answers were received from the heads of the Official Hierarchy in Persia, which most certainly did not deny that conversions could or ought to be made. As to the qualifications, I am not now concerned with them. Nothing in what I may call the official or expert part of the case creates a very high opinion of the intelligence of the good, devout gentlemen who had to some extent the consciences of the Zoroastrian community in their keeping. But it is undeniable that, rightly or wrongly, they, as well as the recipients of the Ravayats, were fully alive to the possibility of conversions; and, with certain reservations of a secular rather than a religious kind, were quite ready to sanction and approve them. In the face of all this evidence, it is idle for the defendants to contend to-day that the idea of conversion, although an integral part of their revealed and accepted religion, had fallen so completely into disuse, that no member of the Bombay Parsi or Zoroastrian community could ever have dreamed of regarding it as a practical and living question.

Before proceeding to develop and explain the final ground on which I rest my conclusion, I must guard against being thought to have looked too much to the consequences of any decision we might give: in other words, to have allowed the expediency to outweigh the rights of the case. *The question, as I understand it, is a simple question, being, in effect whether the defendants have virtually committed the breach of trust, by excluding from the benefits of the trusts persons whom the founders meant to include.* It appears to me, though I express this opinion with diffidence, that any extension or limitation of the

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scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is really a breach—and a very serious breach—of trust. If I am right so far, it would follow—as I held in disposing of the preliminary issue—that this is quite a proper case to be dealt with in a suit under section 539 and that the issue raised is a direct issue of right which will not allow of the introduction of any collateral considerations of what might be profitable and what might be injurious to the community. If the founders of the trusts really meant them to include converts, then the Court would assuredly have to declare that the trusts are meant for converts, even though that decision might have, as was often said in the course of the trial, what the community at large now feel to be disastrous consequences. A Judge has no business with sentiment. He has only to decide upon the evidence before him what are the legal rights in issue. Nevertheless, where, after fully considering all that evidence, the issue remains fairly doubtful where there is no decisive preponderance in the one scale or the other, no doubt a Court might then, and then only, allow its mind to turn to ulterior considerations of the kind I have mentioned. Let me now, once more and for the last time, state the conditions of the problem we have to solve. *We are to ascertain what the intentions of the founders of these trusts were.* We are to put ourselves as nearly as we can in their place, to study the history of the Indian Zoroastrians, tracing the operation of all the influences which must have been brought to bear upon them in their new environment, and more particularly endeavouring to obtain a clear idea of the stage the community as a community of foreign immigrants had reached when these trusts were founded. We have then to study again such documents as are available to us, manifesting in their own words what the founders did intend ; and we have to construe those documents, not necessarily, with absolute verbal literalness, but in the light of contemporary sentiments, as far as that has been made clear to us. It is by this process, and this process alone, I think, that in a case of this kind we can hope to get at, or even near, the truth.

I am quite ready to start with the assumption that the plaintiffs make, namely, that when the Zoroastrian exiles fled from the Mussulman persecution, they brought with them to India, as their common bond—and practically their only common bond—their ancient religion. I will go further and add that, at that remote time they would probably have not only approved but welcomed converts if—to use the phrase that has so often since been repeated—those converts would do no harm to the good religion. They needed help, they needed countenance, they needed, above all things, powerful allies. And no allies were likely to be better disposed to them than such as had been converted to their own faith. They were not then a dominant, but a servient, timid, and scattered people, the mere remnant and struggling fugitives of an overturned kingdom. They were in a strange land, surrounded by strange peoples, professing an unknown religion. In these circumstances, it is easy to understand that while they dared not proselytise, they would have been only too glad to welcome influential converts from Hinduism and Mahomedanism. And this, I have no doubt, is the real explanation of the Pandits and the Akbar story. But two main causes must have been steadily at work to re-mould, and by degrees altogether to transform, the attitude of the community towards conversion. The first, and no doubt the most powerful of these, was the immemorial Indian caste sentiment, with which the whole atmosphere in which they lived was charged. The second was their own growing prosperity. This had a natural and inevitable tendency to reinforce the pressure of the caste principle and to accelerate its growth. Caste must always be more acceptable to a high, than to a low, order in its organization. In proportion as the Indian Zoroastrians were able to compare themselves and their circumstances freely, without apprehension, with the peoples about them with whom they came into the most direct and frequent contact, and from whom they were most likely to receive the infusion of new racial and social strains, it is almost certain that the caste idea must have struck a deeper and deeper root, and coloured all their relations with the indigenous Indians in their neighbourhood. This is not a merely fanciful speculation. I think it is as

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certain a fact as any which could be proved *a posteriori* before us by evidence; and all the evidence which has been laid before us does, in my opinion, conclusively establish it. I cannot too strongly insist upon this substitution of a caste for a religious basis of the organization of the Indian Zoroastrians, because that is the ground upon which *I have, after long and anxious reflection, felt that our common decision can be most securely founded.* While theoretically adhering to their ancient religion and consistently avowing its principal tenets—including, of course, the merit of conversion as a theological dogma, they erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to me to have as distinctly a caste meaning, as essentially a caste connotation, as that used to denominate any other great Indian caste. This, of course, by analogy only; but yet by an analogy that was forced upon the Indian Zoroastrians by the circumstances and conditions in which they found themselves, and by adaptation to which their corporate existence was alone made possible, therefore by an analogy which was both imperative and inevitable. Skipping the intermediate stages, the slow steps of this transforming process—skipping I say, from the beginning twelve hundred years ago to the end to-day, revealed in the defendants' written statement, we need go no further for a complete and unanswerable vindication of the truth of this theory. The first glance at the defendant's definition of members of the Parsi community professing the Zoroastrian faith, satisfied me, once for all, that the basis of the controversy had shifted, and that we were not really concerned with a religious, but with a caste question. If that is so, we must obviously re-adjust our perspective, rearrange the principles applicable, above all prepare ourselves to adopt different criteria in testing the rival cases. The neat logical syllogism with which the plaintiffs opened and upon which they were never able to improve is now seen to require material modifications. It is so—undeniably it is so. The defendants, expressing as we now know the orthodox Parsi view, are prepared to overlook immorality, bastardy—anything but alienage.

They are ready to admit any and every Irani Zoroastrian about whose antecedents they cannot possibly know anything. But they will not admit the purest, most blameless foreigner, of whose character and conduct they may have the completest assurance. They will admit all the illegitimate children of Parsi parents, begotten of prostitutes or kept-mistresses, but they will not admit the noblest, most exemplary foreigner. Why? Because a foreigner is outside the caste, and caste is an institution into which you must be born. Of the modern Parsi they say emphatically *nascitur non fit*. This is not religion, it has nothing to do with religion: it is essentially distinctly irreligious: but it is pure unadulterated oriental caste. This is so plain that I do not apprehend any unbiassed and competent person would dream of contradicting it. Then, what is the consequence? That, too, is equally plain. We have here, what in its origin was not but has undoubtedly become a caste and a singularly powerful, influential, and, in every sense, a superior caste. And our duty is to find out from the materials before us, if we can the period at which the caste sentiment, as the predominant factor of the organization of the Indian Zoroastrians, substituted itself for the religious sentiment. Put in another way: if, at the time these Trusts were founded, the religious sentiment was still decisively predominant, then I think the plaintiffs' contention would be sound, and for my part I should be disposed to give effect to it; but if by that time caste had so far overridden early religion as to have become the decisively predominant factor of the Indian Zoroastrian organization, we should have to apply quite different criteria, and I think that the defendants' contention would correctly express the intention of the founders. The Indian Zoroastrians had been settled in their adopted country, roughly, for a thousand years before the period with which we are directly concerned. During the whole of that time, they had been exposed to the powerful impact of all sorts of social and religious conceptions, yet they were not absorbed. They emerge to-day as distinctive and peculiar a people relatively to the peoples, infinitely out-numbering them, as when they first landed. They have kept their ancient faith pure and undefiled,

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and it is only in our own day, with the great inflation of their wealth and increased facilities of communication with the western world, that we are able to see any disposition at all to relax the rigour of what must have been throughout that period the strongest conservative caste spirit. Immorality there was, and, in the circumstances, of course must have been; but there was never any open public recognition of the slightest deviation from the most rigid caste principle. It is also to be noted that, however liberal they might have been when first they came to India, the Indian Zoroastrians were precluded—by the very means which they, growing in numbers and influence, adopted for the preservation of their own caste purity—from dissipating and losing themselves in the vast ocean of Hinduism about them. Caste again. Just as now that they have assimilated in every sense the caste idea, and made it the bulwark of their tribal or caste unity, so they were themselves hemmed in by it. They could not have entered the societies about them, because those societies, were caste societies and refused to allow anyone who was not born into them within the pale. The very air they breathed for a thousand years was heavy with caste: caste was the condition of all social existence. As a caste, they might hope to preserve and improve their own status; as anything else, they could only expect rapid disintegration, and dissipation on the lowest levels, as unclassified outcastes and pariahs. Yet, of course, there must have been a long conflict between the religious and the caste sentiment, between the claims of religion and the claims of society. They had to serve God, but they also had to serve, to some extent, mammon, or there would shortly have been none of the faithful left to uphold the Holy Mazdiyasnian faith. As we have seen, even to this day, and regarded rather as a theoretical than a practical question, the terms on which conversions are permissible and commendable have been the constant subject of more or less academic discussion. But as a matter of fact, few if any genuine conversions have ever been made; and, so far as our information goes, the conversion of Mrs. Tata is the very first instance of a genuine open conversion of a person in every respect fitted to be a credit and an ornament to the community. I mean, of course, in recent times,

and in circumstances which admit of no doubt or uncertainty. We cannot be sure whether Akbar was converted. In all probability he was not. The Pandits take us back to the dark ages, where myth and legend have free play. All the other alleged instances may be dismissed as cases of illegitimate children or adopted children, or, at the highest, cases of persons smuggled in as converts. Now that the question is fairly brought to the test, where every circumstance, every condition is perfectly well known; where there is not a word to be said against the lady; where she was openly and with great pomp and ceremony received into the communion by one of the leading high priests of Indian Zoroastrians, what do we find? All the learning which used to be spent on the academic discussions I have referred to is thrown to the winds, and the very professors and doctors—who were ready enough when the question was abstract, and in the air, to allow that conversion under certain conditions and with some reservations was commendable—are unanimous in withstanding the attempt to give this new convert full rights of religious communion and sepulture. All this is mere frippery and shallow sophistry. Either admission can be obtained to the Parsi community by conversion, or it cannot. It is simply puerile to pretend, for instance, that the admission of such a refined and cultured lady as Mrs. Tata would do harm to a religion which opens its doors to all sorts and conditions of bastard children. It is still stupider to resist her claims on the ground that she was not duly admitted. She was publicly admitted by a person corresponding in our religion, let us say, to the Archbishop of York: every one knew of it: leading citizens, English as well as Parsi, were invited to be present at the ceremony. The priest who ought to know says that she was fully and regularly admitted. I really had no patience with the quibblings of the learned men who spoke for the defendants, and, while evading the plain direct point, spent hours of our time in trying to reconcile their own absurdly irreconcilable inconsistancies. The real, the plain point was simply this, that notwithstanding anything in their sacred writings, notwithstanding their own published utterances to the contrary, notwithstanding the Ravayats, notwithstanding

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everything, they took their stand not on religion but on caste, and when it came to a practical test, denied that anyone could become a member of the Parsi community except by birth. That in a nutshell was the whole case for the defendants, and exasperatingly though it was presented to us, curiously enough, in the end, I think, that it is a good case and must prevail.

In saying this I must be understood to limit myself strictly to the Trust Funds and Properties, which are the subject-matter of this suit. I do not want to make any general pronouncement or to go one step further than I am obliged. Perhaps, then, I should say that I think—as I shall now shortly, and I trust conclusively, show—it was not the intention of the founders of these Trusts to extend their benefits to anyone who was not in the most rigid caste sense a Parsi, that is, born into the community of the Indian Zoroatrians and born of an Indian Zoroastrian father.

Let us now briefly examine the contemporary documents relating to the immoveable properties, the language of which afforded Mr. Lowndes materials for his most strenuous, impressive, and forcible arguments. These have been set forth in my brother Davar's judgment, and I shall therefore confine myself to what appears to me to be pertinent comment upon them. They are twenty-eight in number. I will just quote the material words of each: (1) "Need of another Dokhma in consquence of the great rise of the Zoroastrian population of Bombay." (2) "The entire Zoroastrian Anjuman." (3) "For the people of the Zoroastrian Community." (4) "For the use of the people of the Mazdiasni religion." (5) "For the people of the Mazdiasni religion." (6) "In accordance with the tenets of the Mazdiasni religion," by the "people of the Anjuman of the Mazdiasni faith." (7) "Persons of the Mazdiasni religion." (8) "Whole Anjuman." (9) "People of the Holy Zoroastrian Community of Bombay." (10) "People of the Zoroastrian Community." (11) "Dasturs and Mobeds and Hurbeds and Behedins of the Mazdiasni religion of the Holy Zoroastrian Community." (12) "Dasturs and Mobeds and Hurbeds and Behedins of the Mazdiasni religion of the Holy Zoroastrian Community." (13) "In the service of the entire Zoroastrian Anjuman of Bombay." (14) "To the Anjuman for the use of all

Zoroastrians." (15) "People of the *firka* of the pure and the best Mazdiasni religion." (16) "By the people of the whole Zoroastrian Anjuman." (17) "Holy Zoroastrian Community of Hindustan." (18) "For the use of the Zoroastrians." (19) 'For the use of the people of the Mazdiasni religion.' (20) "For the use of the Anjuman of the Zoroastrian people." (21) "Anjuman of the Zoroastrian Community." (22) "For the use of the Zoroastrians on the land of the Anjuman." (23) "Khas-o-Am of the Zoroastrian Anjuman." (24) "For the use of the Zoroastrian Anjuman." (25) "Relating to the Zoroastrian Community." (26) "For being used by the Zoroastrian Anjuman." (27) "For the entire Zoroastrian Community." (28) "By the entire Zoroastrian Alum (world)." It is evident that several of these are couched in the most general terms, and it is principally on these that the plaintiffs rely. Others, and a larger number, contain expressions indicating that the caste spirit was active, such as the Zoroastrian community, and the constant reference to the Anjuman. But in not one do we find the word Parsi. In their own solemn religious utterances, the Indian Zoroastrians had not, even so late as this, thought of designating themselves, or their religious communion, by the popular caste appellation of Parsi. Such a term in such a connection would probably have had no meaning for them. On these expressions the plaintiffs have argued that the various religious endowments were clearly intended by the founders for all genuine professors of the Holy Zoroastrian or Mazdiasni faith. And there are among these extracts some that certainly support that contention. Here it is said: "We know that the Holy Mazdiasni religion recommended the making of converts: we have before us contemporaneous proof of what the founders of these Trusts really meant. They say that the trusts are created, not for born 'Parsis'—a word with which they were not familiar—but for all members of the Holy Zoroastrian Church. And since that Church enjoined conversion, they must have contemplated the extension of those benefactions to converts, who, properly admitted, would, of course, profess the Holy Mazdiasni religion." That is a reinforced form of the original syllogism, which I own carried the very greatest weight with me throughout the entire case.

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Still, it will not do to be carried away by one or two isolated phrases. We must first appreciate the collective effect of the whole, if we are to gain anything like a correct insight into the minds and intentions of those who used them. And in doing this, I think that it may fairly be said that the cumulative effect of all these expressions is rather in favour of the view, that the prevalent idea at that time was to provide the community with suitable places of public worship and burial and to place those Institutions under the control of the communal Anjuman. This term Anjuman, with its allied notion of "panchayet," deserves attention. In the first part of his fine judgment, my learned brother has traced these Institutions from their birth in India to the period where one of them, at any rate, vanished. Both, however, suggest an assimilation of the prevalent Indian sentiments relating to caste and the management of caste and communal affairs. The Anjuman is the tribal or caste body politic. Amongst Mussulmans, whence the term must come, there is, of course, strictly speaking, no caste in the Hindu sense, and the Anjuman came to be identified with representative committees of responsible elders and so forth. But it implies control by the whole body, when used as it is used in these inscriptions and documents. And in Western India, even Mussulman ideas have been deeply tinged by infusion from the customs and sentiments of the Hindu population. It is not therefore in the least surprising that the Zoroastrian Anjuman should have given birth to the Parsi Punchayet, the latter of course being essentially a caste institution and working the development of the caste sentiment. The question is how far—at the date of those foundations, say, 150 years ago—the caste had superseded the early religious sentiment? We are not now dealing with an antiquity so remote that all events and personages in it are obscured by the haze of vast lapses of time. The Community of 1750 could not have been so every different from the community of to-day. The sentiments which animated it are probably very much the same —substantially as the sentiments which animate the Parsi community to-day. If anything, we should ordinarly expect the latter to be more, not less, liberal. Of course, it is not safe to generalize too rashly on such points. All sorts of conflicting

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interests may have come to the surface: changed conditions may have given birth to changed notions of policy. But if I am right in believing that, long before the foundation of these trusts, the Parsis had virtually become a caste, saturated with caste prejudices, then it is certain that natures reared in that atmosphere do not change rapidly. It takes long periods, and the continuous pressure of an altered environment, to eradicate the bigotry of caste. Two hundred years ago, the Indian Zoroastrians, though by no means as advanced in culture and wealth and status generally as they are to-day, were still a people who might well be proud of themselves. They still retained, in all its purity, the religion of their fathers; they commanded universal respect as honest, law-abiding citizens; above all they prided themselves on the "theoretical," at any rate, purity of their morals and the uniform thrift of their people. It has often been said that in no other Eastern community are so few beggars and prostitutes to be found. In a word, they had by that time very good reason to respect themselves as a community, to be jealous of themselves as a caste, and to dislike intensely the idea of contamination by too close social intercourse with the inferior classes of the Hindu population. Such I take to be an indisputably true picture of the Indian Zoroastrian community about one hundred fifty years ago. And the question is, whether leading men of that community, men of conspicuous piety, would have intended to open the doors of their churches and burial towers to any and every one who might choose, for whatever motives, to profess the Holy Zoroastrian faith, and had money enough to get some venal priest to formally admit him into the fold. It is not as though the admission of converts could have been effectively regulated by the sense of the community. It has become abundantly plain in the course of this enquiry that the priesthood have practically a free hand. And while, as a body, they probably do not compare unfavourably with the priesthood of any other great religion, it cannot be denied that there are many among them who would not hesitate to sell their priestly functions to any good bidder. My learned brother has dwelt forcibly on this aspect of the case. And no one—while we have little or nothing to do with

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it as merely revealing a possible consequence of deciding in favour of converts—can deny it has a direct bearing upon the central question, what was in the minds of the founders of these trusts? Would they have been blind to such a vital consideration? Would they, proud of their people, religious community, caste, call it what you will, have left it at the mercy of any unprincipled priest? How strongly the cast sentiment has entered into—how completely it has obliterated—the original religious sentiment in this important matter, has been made plain to me over and over again in the course of this suit. We learn with what fierce jealousy the Indian Zoroastrians observe the complicated rights of burial, or rather exposure of the dead on their Towers. We hear of priestly, and for that matter family, restrictions, which are virtually universal in many of the smaller details of life, as well as at the celebration of its great events. And all these are clearly the growth of a highly-developed caste spirit. Looked at from this and not from the purely religious point of view, it would be sacrilege—the worst kind of profanation—to allow any Juddin—that is, a person of another religion, literally but really born outside the caste—to participate in the most preliminary of the death ceremonies. It would undoubtedly horrify the orthodox Indian Zoroastrian to allow such an one in his Fire Temples. It would be idle to tell him that he had been formally admitted to the Holy Religion. That might appeal to his reason, but his caste instincts would at once rebel. To test this we have only to suppose that, instead of a well-bred cultured European lady, the proposed convert had been a Bhungi. No amount of religious conviction, no sincerity of belief, however profound, could, in the eyes of the Indian Zoroastians—brought up as they have been for generations under the influence of caste prohibitions—purge such an one of the inherited taint of his foul caste, or make him an acceptable fellow worshipper in their Temples. Of that no one who has heard the evidence in this case, who is acquainted with the sentiments of even the most liberal and advanced sections of oriental society, could entertain the smallest doubt. It seems to be reserved for the Christian missionary alone, in this country, to invite into his communion the lowliest, the most

despised, the very scum of Eastern humanity. But, then, the Christian Church has never come under the dominance of caste. It developed in the West, among free peoples, and it has remained—in its proselytising enterprises, at any rate—truly Catholic. The same cannot, of course, be said for Zoroastrianism. And the Bombay Zoroastrians are the last people in the world, it would appear, to put forward any such claim. The furthest that the most liberal of them seem disposed to go is that, if undesirable converts of that kind must be made, they must be segregated, for purposes of worship and burial, from those who are born into the faith. In other words, while conversion, as a religious dogma, is not denied, it, as every other social and religious observance, must fall under the rigid regulation of caste. It may, of course, be said that these are the sentiments of to-day, while we are to ascertain the sentiments of one hundred fifty years ago. In the interval, the community has expended, has flourished, grown wealthy, and politically influential. There are many reasons to-day, which did not exist a century-and-a-half ago, why the Zoroastrians of Bombay should wish to keep themselves to themselves and sternly repel any external invasion. To some extent, that is of course true. The learned gentlemen who gave evidence for the plaintiffs afforded some examples of the lengths to which partially informed opinion will go in the direction of social precaution. We were told, amongst other things, that one reason why the conversion of aliens to the Holy Zoroastrian faith was no longer permissible in Bombay, if it ever had been was that unscrupulous European women would pretend to be converts, in order to marry eligible Parsi young men, and so there would not be enough husbands to go round. The Parsi maidens we were told would be deserted; and one high priest even assured us that, owing to this lamentable tendency, he knew of a Parsi virgin of forty still looking out in vain for a husband. This is the merest absurdity. No doubt, the point of view shifts with circumstances. What might have been thought desirable in a struggling and not too influential community, might be thought very undesirable after that community had progressed and stepped into the first rank. And I am quite sure that the good men who founded these Trusts, even if they had, when the matter

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was fully laid before them, declared that they did not wish them to be available to converts, would never have had recourse to such unsubstantial reasons in support of their decision. Let us now suppose that these men when they were founding the trusts had had the question fairly and squarely put to them: "Do you intend that these Towers of Silence and these Fire Temples shall be used by converts as well as members of the Holy Zoroastrian community? What would their answer have been? We have abundant evidence to show with what disapproval the better class—the class from whom these founders came—regarded the lax morals of the Mofussil Parsis. It was not only because that conduct was irreligious—though that, too, doubtless weighed with them—but because it was lowering to the status of the community. Keeping Dubri mistresses and having Dubri children, was not only shocking to the correct Zoroastrian, as a marital offence—an offence, too, against his religion—but because the Dubri woman belonged to a very low caste. It may be very well doubted whether at that time the same disapproval would have been extended to intermarriages —real marriages—with men of equal or superior rank. The early history of the Parsis, or rather the Zoroastrians, shows conclusively that such marriages often did occur, and that no one dreamed of stigmatizing them as religious sins. But that was before the community had become a caste, while still the Zoroastrians were a nation; and the alliances were with people of their own or higher rank. At the time, however, that these trusts were founded, it was hardly likely that any Parsi would intermarry with superior races, while there was a constant and growing danger that he might intermarry with inferior castes. Probably the founders of these trusts would at first have replied, as all the priests and doctors have consistently replied: "By all means let converts use our Endowments, if they are converts who will be a credit to us." But that would not have done. It would have had to be explained to them that they must admit all or none. And they would instantly have realized that for one Akbar who was ever likely to become a convert, there were a hundred Dubras or Bhungis. And with that terrible possibility before their eyes, no one can doubt—I am sure

that I do not doubt—that they would unhesitatingly have replied: "No converts, then, on any terms."

As helping us to a better understanding of the mental attitude of the men who used the expressions we are considering at the time they used them, we may turn with advantage once more to the undoubted fact that, whether the Zoroastrian religion recommends making converts or not, the circumstances in which the Zoroastrian refugees found themselves on reaching India put all idea of giving practical effect to any such recommendation out of their heads, so that, as time went on, except as a theological dogma, and in a few cases, like those of the Pandits and Akbar, genuine conversion, as a religious duty, had fallen into such complete desuetude, and any variant of it that did come up for discussion had so invariably turned upon the moral expediency of the particular case, that moral expediency, again always resolving itself into ultimate caste considerations, and the instances being almost invariably of extremely undesirable persons, whom the better sort wanted to exclude, that it may quite fairly be argued the use of very general language, which, by its terms, taken literally, would seem to include, all converts, does not necessarily mean that any such notion was definitely before the minds, or much less intended by those who used that language. When, 150 years ago, leading members of the Indian Zoroastrians talked about dedicating Temples and Towers to the Zoroastrian community, or for the benefit of all of the Holy Mazdiasni faith, we must reflect how those ideas presented themselves to the speakers. For many hundreds of years the Zoroastrian community in India had meant one thing—and one thing only to them—their own select people. And the Holy Mazdiasni faith, as far as they knew, was professed by that select body and by them alone. The religion—originally the principal, if not the only social and tribal bond—had long since been converted also into a distinctive caste badge. Being a member of the good religion was doubtless at that time synonymous with being a member of what we may now, I think, fairly call the Parsi caste. The subject of conversion was unquestionably, as a theoretical dogma, recurrently in the air, but it was growing constantly to be more and more imperatively conditioned by purely caste consi-

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derations. As I have said, I think it likely that had these founders of the trusts been asked whether they were prepared to accept converts, they would have replied that they would not object to duly-accredited and approved converts. And what they would have had in mind was a regular convocation of Elders on each case as it arose, to decide whether the person proposed was eligible and desirable, much as members are admitted into an exclusive club. Had they been further told that this would be impossible, that they must choose between accepting any convert or none—that accepting any meant accepting all converts indiscriminately; and had it been further pointed out to them that the probabilities were immensely in favour of hundreds of the most undesirable people, for every single desirable person, offering themselves for conversion; looking to the constitution of the society, its attitude towards Dubras, its attitude towards the surrounding inferior Hindu castes, I cannot doubt for a moment that they would have unhesitatingly said that, whatever might be the abstract religious dogma, they meant *their* benefactions for their own people, the members of the Indian Zoroastrian community, that is to say, those who, as in the case of every other close caste, were born into it. It is difficult for any Englishman—probably impossible for any English Churchman who has not been for years in close intimate contact with Orientals of all religions and castes—to put himself into the place of men situated as the founders of these trusts were situated. We must find it hard to realize or even faintly appreciate the sense of repulsion which orthodox Zoroastrians would feel at the bare idea of their places of communal worship, much worse their sacred Towers of Silence, being invaded by persons whose very proximity in the streets, or on the thresholds of private dwellings, had for generations been regarded as a contamination. No English Christian would think of regarding a place of worship desecrated, because a genuine believer happened to have come from a base trade; still less would he deny to such an one rites of Christian burial in a Christian cemetery. But in the Zoroastrian community, the conditions are widely different. There, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound

up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical; and there is only this difference, that a modern orthodox Parsi would shrink with infinitely greater loathing and horror from admitting to his Temples and Towers a person whose presence was a social contamination, than he would from admitting him to his table and the freedom of his family circle. No respectable Parsi would dream of eating with, say, a Bhungi. It would seem to him utterly impossible to do so; it would defile him in what is really as an essential caste sentiment. But that defilement would infinitely be worse—more irreparable and far reaching—if it touched the sacred sources of the whole communal and caste existence—the ancient places of pure religious worship.

Now, if we were to hold upon the strength of scattered phrases irrespective of the conditions of the community, leading members of which used them that the original Zoroastrian religion enjoined the making of converts, and therefore since these endowments were dedicated to the use of all of the pure and good faith, therefore they were open to all converts indiscriminately, we should undoubtedly profoundly shock the sentiments of the whole community. There might be a constant stream of the lowest and most despised persons pouring into it, and in the estimation of all good Zoroastrians polluting the Temples and Towers. We should be inviting the immediate disruption of the whole ecclesiastical establishment. Genuine Zoroastrians would feel that the venerated seats of their ancient religion were desecrated past redemption, and no longer fit to be used by those of the old faith. Their position in this matter seems to me quite simple, and, in view of the considerations I have been discussing, quite intelligible. They say, we do not object to proselytising fanatics—if there be any such among us—making converts to Zoroastrianism. But if they do, they must provide separate Temples and Towers for their use. These are our Temples and our Towers. Never since their foundation have they been desecrated by the admission, to our knowledge of a single person who was not one of us—that is, of our caste, born into it, and brought up in it. And it has grown to be an integral part of our religious and social organization that these Temples

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and Towers shall for ever remain consecrated exclusively to the religious and ritual uses of such persons, and such persons only. Destroy that belief, and you sever all the bonds of our caste cohesion: we must cease to be what we have so long prided ourselves on being—a chosen and peculiar people.

That is what, in effect, we have been told over and over again in the progress of this case: and it does, I believe, fairly represent what the founders of these benefactions really felt, and would have unqualifiedly expressed, had they been called upon categorically to do so. They did not guard against the present peril, because it never occurred to them. This, shortly, is the ground upon which I have come to the conclusion that, while the Zoroastrian religion certainly did originally recommend making converts, it was not the intention of the founders of these Trusts to throw them open indiscriminately to any and every convert. And for the purposes of this case that is tantamount to holding that they did not intend to throw them open to any converts.

We have heard a great deal of the usages and tenets of the religion as practised at the time these trusts were created. What I have said—though by no means an exhaustive statement of all the case contains on this head—will, I think, suffice to show how I have considered and disposed in my own mind of that line of reasoning. I therefore concur with my learned brother in his conclusion on the second, as well as upon the first, part of the case. I concur with my brother Davar's formal findings on the issues, unless any modification in respect of any one of them may be clearly required by what I have said in the foregoing judgment, and with the exception of his finding upon the preliminary legal objection. Upon that, as I have stated at length, I have felt myself forced to an opposite conclusion. I hold that the suit lies as framed for the particular relief, and that that relief could be granted to the plaintiffs in the suit—if to such relief or reliefs they were found entitled.

I entirely agree with the order which my learned brother proposes to make for costs, particularly that the plaintiffs should, under the circumstances of the case, have all their costs out of one or more of the trust Funds

I cannot close without expressing my deep sense of gratitude and obligation to my brother Davar for the immense amount of labour he has spared me. All the drudgery of the case fell on his shoulders. I was in the relatively favourable position of an undistracted listener. He has laboured unremittingly, not only to make the record a full and true record of every detail, down to the minutest that either party submitted to us, but afterwards to co-ordinate the unwieldy mass of materials thus collected, to shape every part of the case, and to bring every important point with all the materials relating to it, before my mind, often back to my recollection. In the constant, often long and arduous, discussions we have held orally and in writing over points upon which we doubted whether we agreed, my brother Davar has shown the most consistent and conspicuous courtesy, patience, and open-mindedness. And it is a source of the deepest gratification to me that, after all, I have found myself able to agree with him on every main point. My acknowledgments, too, like his, are due to the eminent counsel, who, with so much industry, brilliantly presented the opposing cases, as ably, as thoroughly, and as worthily as the great occasion demanded.

Attorneys for the plaintiffs: *Messrs. Ardeshir, Hormasji, Dinshaw & Co.*

Attorneys for the defendants: *Messrs. Craigie, Lynch & Owen.*

B. N. L.

Note.—Italicised words or sentences, occurring in quotations from treatises or documents and embodied in the judgment of Mr. Justice Davar, indicate that Mr. Justice Davar desired to emphasise those particular words or sentences and do not indicate that they were so italicised in the originals from which the quotations are taken.—Ed.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

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ARDESIR BEJONJI SURTI, APPELLANT AND PLAINTIFF, *v.* SYED SIRDAR ALI KHAN AND OTHERS, RESPONDENTS AND DEFENDANTS.*

Lease unregistered when admissible in evidence—Conduct of parties to lease —"Collateral purpose"—Transfer of Property Act (IV of 1882), section 107—Lien—Charge—Assignment.

Where a lease which requires registration is not registered it cannot be put in evidence. But if the parties to it have acted upon its terms, whatever they were, or if a certain course of conduct has been pursued by either party which in point of fact constitutes the relation of landlord and tenant between them, and if in pursuance of that relation one party has paid certain moneys from time to time to another as a deposit to secure the performance by the former of the covenants and conditions of the lease, then a person suing to recover the money so deposited may give the lease in evidence for the purpose of proving his right to recover the deposit.

Such admission of the lease would not contravene the provisions of the Registration Act because it would in that case be put in evidence not for the purpose of affecting any immoveable property but for a collateral purpose, *i.e.*, for the purpose of proving a money debt arising from the conduct of the parties.

Pullbrook v. *Lawes*(1) referred to.

Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (*i.e.*, a lease) conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel.

Cornish v. *Abington*(2) referred to.

The mere fact that parties have described a transaction as a "lien" or "charge" cannot deprive it of its real nature if in substance the transaction was in the first instance an assignment. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person the words lien or charge have no meaning except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what in English law is called a *chose in action* transfers it to another.

APPEAL from the decision of Russell, J.

* Suit No. 159 of 1907.
Appeal No. 29 of 1908.

(1) (1876) 1 Q. B. D. 284. (2) (1859) 4 H. & N. 549.

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The appellant Ardesir Bejonji Surti brought a suit to recover from Syed Sirdar Ali Khan (respondent No. 1) moneys alleged to have been deposited with him by Ruttonji Sorabji Munshi (respondent No. 3) as security for the due performance of the covenants of a lease (dated 3rd October 1906) of certain premises executed by the former in favour of the latter for a period of ten years.

The appellant claimed the deposit money amounting to Rs. 25,554 under an assignment (dated 8th of January 1907) from (respondent No. 3) of which notice had been given to respondent No. 1, alleging that the lease had been determined by respondent No. 1 re-entering the premises on the 5th January 1907; that on such determination he, as assignee, was entitled to recover the deposit after deducting from it Rs. 5,000 in respect of municipal taxes and ground-rent which respondent No. 3 was bound to pay under the terms of the lease; and that respondent No. 1 was not entitled to forfeit the said deposit as he had no right of action or remedy except for breaches of covenant antecedent to his re-entry.

Respondent No. 1 denied appellant's right to recover the deposit. Mirza Abbas Ali Baig (respondent No. 2) in his written statement stated that respondent No. 3 was much pressed by a creditor named Haji Jakeria Ahmed Patel and requested him to assist him (respondent No. 3); that respondent No. 3 had given him to understand that Haji Jakeria had a lien on the deposit (Exhibit 14) and that if he advanced moneys to pay off Haji Jakeria he would be secured by a lien on the said deposit which respondent No. 3 would give him; that Haji Jakeria was paid off with the money advanced by him; that prior to Haji Jakeria being paid off he had a lien or charge on the said deposit for the moneys advanced by him subject to the lien of Haji Jakeria: that on Haji Jakeria being paid off he had the first lien or charge on the deposit; that the lien and charge of Haji Jakeria was transferred to him by a document (Exhibit 14A); that respondent No. 3 had passed a promissory note to him for the amount he had paid and that he had obtained a decree against respondent No. 3 for the said amount; that he claimed a lien and charge on the said deposit in priority to the appellant as he had

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advanced money on the security of the said deposit; and that the appellant was the managing clerk of respondent No. 3's solicitors and that as the appellant attended to respondent No. 3's affairs he believed that the appellant was well aware of all facts and took the assignment from respondent No. 3 with notice of his claim.

Exhibits 14 and 14A, referred to above, were in the following terms:—

Exhibit No. 14.

I hereby give you a lien on the amount of Rs. 18,666, deposited by me with Syed Sirdar Ali Khan, sole Executor of the estate of Nawab Sirdar Diler Jung Bahadur, C. I. E., as security for the due fulfilment of the agreement to lease dated the 3rd April 1906 and under the lease of the said Watson's Hotel Annexe to be executed hereafter in consideration of your renewing my Hundies to the extent of Rs. 15,000 (fifteen thousand) in the event of my failing to pay the said amount of such Hundies on their respective due dates.

Exhibit No. 14 A.
On the back of Exhibit 14.

At the request of Mr. R. S. Munshi, I have transferred the within charge or lien on the sum of Rs. 18,666 within mentioned to Mirza Abbas Ali Baig in consideration of Rs. 18,121-11-0 advanced by him to Mr. R. S. Munshi, the said R. S. Munshi has agreed to execute a formal deed of charge in favour of the said Mirza Abbas Ali Baig when prepared.

As regards the claim of respondent No. 2 the appellant admitted that respondent No. 3 had passed to Haji Jakeria a writing in which reference was made to the said deposit but did not admit that any charge was thereby created in favour of Haji Jakeria. Further he stated that even if a charge ever came into operation it ceased to be operative on respondent No. 3 duly paying off Haji Jakeria; that respondent No. 2 had advanced money on the personal security of respondent No. 3: and that no lien or charge on the deposit was ever given to respondent No. 2.

The following are the two interlocutory judgments delivered by Russell, J., in the course of the hearing of the case.

RUSSELL, J.—The question that I have to determine in this case has arisen certainly in an unusual way. It is not necessary for me to go into details with regard to the plaintiff's claim as

framed. Suffice it to say for the present purpose, however, that the plaint starts by setting out the details of a certain lease dated the 3rd October 1906 between the first defendant and the third defendant and the claim of the plaintiff put very shortly is that he may be declared entitled to a prior lien or charge in respect of certain moneys as to which he became liable as a surety for the third defendant for the payment of the rent and performance of the lease. I am purposely putting this as concisely as possible because really the matter is or may be a good deal more complicated.

Now it appears that when the plaint was filed the plaintiff was under the impression that this lease was duly registered; but since then it has been discovered that the lease has not been registered. In consequence Mr. Lowndes very properly asked that the plaintiff's case might be opened so that, having regard to this altered state of circumstances caused by the non-registration of the lease, he might know what case he has to meet before he raised the issues, and accordingly Mr. Tarapurvala began to open the case. In the course of that opening the question has arisen whether or not the particular clause, which is 17 in the lease, is admissible without registration, and I have heard very lengthy arguments on the part of the plaintiff and also a concise one on the part of the defendants on the point. I apprehend that the lease must be looked at as a whole. It commences:—"In consideration of the rents, covenants and conditions hereinafter reserved and contained and on the part of the lessee to be paid, performed and observed, the lessor doth hereby demise unto the lessee" etc. Now clause 17 says:—"By way of deposit for the due performance by the lessee of the covenants hereinbefore contained the lessee shall deposit with the lessor the sum of Rupees thirty-three thousand three hundred and thirty-three, which amount shall remain with the lessor as security till the determination of the term hereby granted." Then it provides for the payment. Then clause 19 says:—"Provided always and these presents are upon this condition that if the said yearly and other rents hereby reserved or any of them or any part thereof shall at any time be in arrear or unpaid for the space of three calendar months

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after the same shall have become due whether any formal or legal demand shall have been made or not or if the lessee at any time fail or neglect to perform and observe any of the covenants, conditions and agreements herein contained and on his part to be performed and observed, then in any such case it shall be lawful for the lessor, or any person or persons duly authorized by him in that behalf into or upon the said hereby demised premises or any part thereof in the name of the whole to re-enter."

The question that arises, therefore, is:—Can it be said that these clauses "evidence a transaction affecting a right to immoveable property?"

It appears to me that the right to rent is an interest in immoveable property. Therefore an instrument, which creates the right to rent, is an instrument, which creates a right or interest in immoveable property; and inasmuch as the payment of the rent is secured by clause 17, it appears to me that the transaction which secures that payment must necessarily be a transaction which affects this interest, namely, the rent, immoveable property. I cannot see how I can read the words in the Act "transaction affecting the immoveable property" in any other way.

Of the cases cited to me it appears that *Gurunath* v. *Cheubasappa*[1] is binding on me and is very similar to the present case: the judgment of Sir Charles Sargent being very applicable. In my opinion therefore the document in question does require registration.

The case will therefore continue to be opened so that Mr. Lowndes may know how the plaintiff intends to put it and then frame the issues.

RUSSELL, J.:—I have taken time to consider the question as to whether clause 23 of the agreement in this case requires registration. The material portion of that clause runs as follows:—

"The lessee agrees to pay Rs. 33,333 as deposit for the due performance of the lease. This amount to remain with the

(1) (1893) 18 Bom. 745.

lessor as security until the termination of the tenancy." The rest of the clause is immaterial.

Now it appears to me that my decision upon this point must follow that upon the question of the registration of the lease itself. I do not propose to go over the grounds of my judgment on that point but I should like to refer to the judgment of Sir Charles Sargent in the case of *Gurunath Shrinivas Desai* v. *Chenbasappa*,[1] where he says: "The District Judge was wrong in holding that the term in the lease on which the plaintiff sued could be looked at although the lease itself required registration. That term cannot be separated from the lease itself, as the lease must necessarily be looked at to determine whether the defendant had incurred liability under it." It appears to me that looking at clause 23 of this agreement the lease must necessarily be looked at to determine what would be liabilities of the lessee under it, and therefore the judgment is binding on me and governs the present case.

Mr. Lowndes, however, raised another point with regard to this matter, and that is, he relied upon the judgment of Lord Justice James in *Leggott* v. *Barrett*[2] and this raises, as far as I am able to discover, a novel point because with the exception of this case which Mr. Lowndes referred to me I have been unable to find any authority or statement in any of the text books exactly in point, or which marks so clearly the distinction between an agreement for a deed or executory contract and the actual deed itself. [His Lordship quoted the judgment of Lord Justice James, at pages 309-310 in full.] Now it certainly did seem to me a somewhat startling proposition that although the Court had held the actual lease itself to be inadmissible on the ground of registration it could go behind the lease and hold that the agreement for the lease which was afterwards carried out by the deed might be admitted under the Registration Act. To do so would be to give an effect to the agreement which James, L.J., says cannot be given, so it appears to me. His judgment as I read it prevents me from looking at or taking into consideration the agreement for the lease, because it was afterwards embodied in the lease itself, the governing document. If that cannot be

(1) (1893) 18 Bom. 745. (2) (1880) 15 Ch. D. 306, at p. 309.

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admitted in evidence, I fail to see how the document which it governs and supersedes can be admitted. I have not been able to find any case in India on the point. I may observe that it is only for the purpose of the Registration Act that the lease is not admissible. For all other purposes it is a deed and exists as a deed between the parties.

For these reasons, in my opinion clause 23 of this agreement of lease does require registration and I must therefore hold that it is not admissible as I held the lease not to be certified to be a true.

Russell, J., dismissed the plaintiff's suit. After stating the facts and discussing the evidence his Lordship proceeded as follows:—

It now becomes for me to consider the legal aspects of the case as put before me by Counsel respectively for plaintiff and defendants 1 and 2 and it will be desirable to deal first with the legal aspects of the case as between the plaintiff and defendant 1.

Mr. Lowndes' argument is that by reason of defendant 3rd's failing to carry out certain conditions the nature of which, owing to the lease and agreement for lease not being registered, I cannot discover, the deposit was wholly forfeited to defendant 1, and therefore, the plaintiff who stands in the shoes of Munshi, cannot recover it. In support of his argument he relied on the following cases:—

Reynolds v. *Bridge*[1], *Wallis* v. *Smith*[2], *Cooper* v. *London and Brighton Railway Co.*[3], *Howe* v. *Smith*[4]. But in *Reynolds* v. *Bridge*[1] it was expressly provided that if the defendant should make default in the amount, he should pay to the plaintiff £2,000 as ascertained liquidated damages. So in *Wallis* v. *Smith*[2], the defendant was to pay £5,000 if he committed a substantial breach of the contract. In *Cooper* v. *London and Brighton Railway Co.*[3] the deposit on the season-ticket being bought was expressly to be forfeited on the breach of any of the conditions. In *Howe* v. *Smith*[4] the deposit was a guarantee for

(1) (1856) 6 El. & Bl. 528.
(2) (1882) 21 Ch. D. 243 at p. 257.
(3) (1879) 4 Ex. D. 88.
(4) (1884) 27 Ch. D. 89.

the performance of a contract. In this last case Bowen, L. J., cites (p. 97) *Palmer* v. *Temple*[1], where at p. 520 it was said that in the absence of any specific provision, the question whether the deposit is forfeited depends on the intention of the parties to be collected from the whole instrument. Now in the case before me I am not entitled to look at the whole instrument, so I cannot gather the intention of the parties from it. In my opinion however the true principle to be applied to the present case according to English Law is to be found in *Lord Elphinstone* v. *Monkland Iron and Coal Company*[2] and *Willson* v. *Love*[3].

The headnotes in these two cases are as follows:—

"When a lease is not assignable without the landlord's assent, the fact that the landlord did not object to the assignees taking possession cannot, irrespective of all other circumstaces, be held sufficient to imply his recognition of the assignees."

"Where a lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term, but to consume the same upon the premises, and provided that an additional rent of 3*l.* per ton should be payable by way of penalty for every ton of hay or straw so sold, and it appeared that there was a substantial difference between the manurial value of hay and that of straw:—*Held* that the sum so made payable was a penalty and not liquidated damages."

The principles in *Lord Elphinstone* v. *Monkland Iron and Coal Company*[2], have been applied in *Clydebank Engineering and Shipbuilding Company* v. *Don Jose Ramos Yzquierdo Y Castaneda*[4] and *Diestal* v. *Stevenson*[5]. See also *Pye* v. *British Automobile Commercial Syndicate, Limited*,[6] where it was held that to ascertain whether the sum payable for compensation is a penalty or liquidated damages, the Court must take all the circumstances into consideration to ascertain the intention of the parties.

Suppose defendant 3 was suing defendant 1 for the return of the deposit, I should feel great difficulty in holding (as I would have to hold if Mr. Lowndes' argument is correct) that it would be a good defence for defendant 1 to say you have not performed

(1) (1839) 9 Ad. & E. 508.
(2) (1886) 11 App. Cas. 332.
(3) [1896] 1 Q. B. 626.
(4) [1905] A. C. 6 at p. 15.
(5) [1906] 2 K. B. 345.
(6) [1906] 1 K. B. 425.

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all the conditions of the lease and therefore all the deposit is forfeited and I am entitled to retain the whole of it.

But, in my opinion, the law is most clearly stated by Lord Macnaghten in the case of *Soper* v. *Arnold*[1]:

> There was a contract for the sale of some real property. There were the usual conditions of sale. There was a deposit paid, and there were the ordinary provisions as to the forfeiture of the deposit. An abstract was delivered: the vendors' title was fully disclosed; that title was duly accepted and approved; the conveyance was prepared, and everything seemed ready for completion; but when the time came for paying the price the balance of the purchase-money was not forthcoming. The purchaser had to abandon the contract; the deposit was forfeited, and the matter was apparently closed. Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

No doubt under the Transfer of Property Act, a lease is a transfer of property, as is a sale, but I do not think it follows from that, that the same principles apply to a deposit for the performance of the terms of a lease as to a deposit for the purchase of property. It is well known that a lease contains covenants of very various importance.

The purchaser says I "mean business," that is to say, "I am going to buy"—one single act—"and I deposit so much to guarantee that one act." The lessee means business and says "I deposit so much as a guarantee that I will perform a number of acts of more or less importance." Of course, I am not at liberty in this case to look at the terms of the agreement of the lease. A deposit on account of purchase-money is a well-known phrase but as far as I know, one has never heard of a deposit on account of a leasehold. I can quite understand a man saying "I deposit so much as a guarantee that I will buy your property" but I cannot understand him saying "I deposit so much as a guarantee that I will carry out all the terms of the lease and if I don't paint a wall or room my deposit is to be forfeited." In

(1) (1889) 14 App. Cas. 429 at p. 435.

the present instance, for instance, it would, I think, be going too far to say that if defendant 3 had failed to paint a part of the Annexe costing say Rs. 500, it could have been intended that he should forfeit the deposit amounting to Rs. 33,333. Upon this point I confess I agree with Mr. Strangman's argument when he relied upon section 74 of the Contract Act which, as Sir Frederick Pollock says, boldly cuts the most troublesome knot in the Common law doctrine of damages, and looking at the terms of that section, it appears to me that it would be impossible to hold that the deposit in the present case has wholly been forfeited. I read the section which is in a Code relating to contracts in India and which, *Bank of England* v. *Vagliano Brothers*[1] followed in *Norendra Nath Sircar* v. *Kamalbasini Dasi*[2] shows, I am bound to follow.

Defendant has sought to prove a number of items, *e. g.*, damage to furniture and crockery, damage to good-will, servants' wages paid by him on third defendant's behalf, Osler's bill of electrical fittings, but in the absence of a lease and agreement for lease, apart from any other consideration I fail to see how he can set up any liability of defendant 3 in respect of these sums. But no doubt in respect of the amounts due to the Port Trust for ground-rent and the Municipal taxes down to 5th January 1907 when defendant resumed possession of the premises, which are admitted by plaintiff, these amounts ought to be allowed to be deducted from the deposit which of course would leave a balance in favour of the plaintiff but for the circumstances I hereinafter set forth.

This leads me, therefore, to defendant 2's case. I have above fully set forth the reasons which have led me to the conclusions of fact upon it.

Mr. Strangman's main argument was upon the wording of the letter of lien, Exhibit No. 14 itself, namely, that the words at the end of Exhibit No. 14—"In the event of my failing to pay the said amount of such hundies on their respective due dates"—governed the whole document and that inasmuch as Jackeria had been paid off in October 1906, his agent Budha had nothing to transfer by

(1) [1891] A. C. 107. (2) (1896) L. R. 23 I. A. 18.

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the endorsement Exhibit 14A, but to my mind the wordings of Exhibit No. 14 is perfectly clear and the words at the end of it which I have above quoted must be held to refer to the prior words " In consideration of your renewing my hundies to the extent of Rs. 15,000 " and not to the words at the beginning of it—" I hereby give you a lien on the amount of Rs. 18,666."

Again it appears to me that to hold that Jackeria through his agent had nothing to transfer when the endorsement Exhibit No. 14A was executed would be contrary to the effect of the whole transaction and upon this point the wording of 14A seems to me very material, particularly so if Budha's evidence is correct that it was sent to him typed by defendant 3. It does not say, " I having been paid off the amount hereby transfer the within charge of lien, etc., in consideration of such and such a sum paid to me " but it says " I have transferred the within charge or lien in consideration of rupees so much advanced by Baig to defendant 3," and therefore, upon the wording at the date of the transfer of charge or lien, it must I think be taken to be the living charge or lien and not a dead one. And if my view of the transaction is correct, the effect of it was that Jackeria having a valid and effectual lien or charge upon the deposit, in consideration of Baig's having paid to defendant 3 the amount that defendant 3 owed to Jackeria, Baig stood in the shoes of Jackeria and was entitled to the same rights as to the deposit as Jackeria himself was entitled to, and looking at the terms of Exhibit No. 19, Baig's letter to defendant 1 of the 28th September 1906, it must, in my opinion, be taken that defendant 1 was aware of and agreed to the proposed transfer.

Therefore, in my opinion, the first paragraph of section 130 of the Transfer of Property Act has been complied with.

That section being in a Code, is the only law to be considered *Bank of England* v. *Vagliano Brothers*[1]. It is perfectly clear and intelligible. It sweeps away all the difficult questions regarding privities between transferee dependent on notice being given to the debtor or to the person in whom the property was vested. The transfer, according to this section, is " complete and effectual

(1) [1891] A. C. 107.

on the execution of the requisite instrument, and thereupon the transferee has vested in him all the rights of the transferor. The possibility of a second assignment to another assignee is thus excluded, for the assignee has nothing left to assign."—The Transfer of Property Act by Shepherd and Brown, 6th edition, page 571. And notice to the debtor is not requisite to complete the transfer, as between the transferor, his creditors or executors on the one hand and the transferee on the other (ibid., p. 572).

Moreover, if the assignment to Baig was valid and effectual, the plaintiff's assignment was subject to the liabilities and equities to which defendant 3 was subject in respect thereof on the 8th January 1907. Section 132 of Transfer of Property Act.

Under the above circumstances, it is unnecessary to consider what are the legal and what the equitable rights as between the plaintiff and Baig. Nor is it necessary to decide the point raised by Mr. Strangman as to marshalling in favour of the plaintiff.

I therefore hold that upon the execution of Exhibit 14A, there was a valid transfer of Jackeria's claim to the deposit which became complete and effectual upon the execution of 14A, and thereupon all Jackeria's rights and remedies vested in Baig.

It is admitted by the plaintiff that if the transfer to Baig is a valid one, he can get nothing by this suit.

The plaintiff appealed.

Robertson (with him *Padshah* and *Taraporwalla*) for the appellant.

We are entitled to recover under section 65 of the Contract Act and section 81 of the Trust Act.

Our suit is not based on the lease but is simply to recover the monies deposited by Munshi with Sirdar Ali Khan the lease being only the occasion and the reason for making the deposit. This is clearly shown by the issues raised on our behalf (Nos. 15-16). The fact that the lease was unregistered only deprived the plaintiff of the right to use it in evidence.

As to the admissibility of clause 17 of the lease which relates to the deposit it has been held that though a document cannot

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become inadmissible in evidence for want of registration, the contract had become void, and that under section 65 of the Indian Contract Act the first respondent was bound to restore any advantage he had received under the contract or to make compensation for it to the third respondent. Under section 2, cl. (*g*) of the Act, an agreement is said to be "void" when "it is not enforceable by law" that is, when its terms being ascertained have no legal effect at all. That cannot be predicated of an agreement which the law declares has no existence because there is no evidence of its terms. "The mere fact of one party having paid money to another, under a contract which he cannot enforce against the latter, because of its non-compliance with the provisions of the Statute of Frauds, will not entitle the party who has paid such money, to recover the same as on a failure of consideration; for in such a case the contract is not void, but there is merely a deficiency in the evidence thereof."(1) Further, there is this to be said that not only the Registration Act but also the Transfer of Property Act created a bar in the way of the appellant's suit as it was launched in the Court below. Section 107 of the latter Act provides that "a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument." And the law is that "if an Act of Parliament says that a contract shall be carried into effect in a given way, and such enactment is not by way of direction merely, then the additional words 'that shall not be of any effect either in law or in equity' are superfluous, because if the Act says that is the way all property shall be acquired, you must comply with those provisions, in order to acquire the property—the property is to be given in that mode, and that mode only."(2) Accordingly, it has been held by this Court on the construction of the first paragraph of section 54 of the Transfer of Property Act, which relates to sales of immovable property and the language of which, so far as it is material for our present purpose, is similar to that of section 107, that there cannot be

(1) Chitty Junr. on Contracts, page 581, 8th Edition (12th Edition, p. 93), citing *Sweet* v. *Lee*, (1841) 3 M. & G. 452.

(2) Per Wood V. C. in *Liverpool Borough Bank* v. *Turner*, (1860) 29 L. J. Ch. 827, 830.

a sale except by a registered instrument in the class of cases mentioned in the paragraph[1].

It follows then that the appellant could not in support of his claim rely on the lease referred to in his plaint and prove any cause of action alleged to have arisen from it.

But although that was so, there was enough in the plaint and also in the written statement to show that, though the lease had not been registered, the parties to it had acted upon its terms, whatever they were, that a certain course of conduct had been pursued by either, which in point of fact constituted the relation of landlord and tenant between them, and that it was in pursuance of that relation that the third respondent had paid certain moneys from time to time to the first respondent as a deposit to secure the performance by the former of the covenants and conditions in the lease. The law applicable to this state of facts is summarized by the Editors of Smith's Leading Cases Volume I, 10th Edition* (pp. 307 and 308), as follows on the authority of the cases there cited, of which the principal is *Pulbrook* v. *Lawes*[2] :—

"Although a plaintiff be prevented by the statute from availing himself of his special contract, he may nevertheless be able to recover upon one of the money counts anything in the nature of a debt which has accrued to him by reason of his acting upon the contract."

From this point of view it would be open to the plaintiff to give the lease in evidence for the purpose of proving his right to recover the moneys lodged by the third respondent with the first respondent as a debt due from the latter. Such admission of the lease would not contravene the provisions of the Registration Act, because it would in that case be put in evidence, not for the purpose of affecting any immovable property, but, to borrow the language of Blackburn, J., in *Pulbrook* v. *Lawes*, for "a collateral purpose," *i. e.*, for the purpose of proving a money debt arising from the conduct

(1) (1904) 28 Bom. 466; see also a Full Bench ruling of the Madras High Court to the same effect approving of 28 Bom. 466 in (1904) 29 Mad. 336.

(2) (1876) 1 Q. B. D. 284.

* 11th Edition, p. 321.

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of the parties[1]. Nor would that view contravene the provisions of section 107 of the Transfer of Property Act. All that that section enacts is that if parties enter into a transaction by way of a lease of immovable property, it shall have no operation as a lease and shall not constitute the relation of landlord and tenant between the parties in certain cases unless the transaction is embodied in a registered instrument. But the section does not say that if the parties without any such instrument conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease, because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel in section 115 of the Indian Evidence Act. As was said in *Cornish* v. *Abington*[2] :—"If any person by actual expressions, or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or license, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

This view of the case was not presented at the trial in the Court below, where both Judge and Counsel thought that the appellant's case had an insuperable difficulty to meet on account of the non-registration of the lease and that there was the authority of no decided case in point which could be invoked in order to establish his right to recover the moneys in dispute. Having regard to the law which we have stated at some length above, it would become necessary to allow the appellant to amend his plaint and prove the case so stated unless the decree of the Court below should be confirmed upon the ground that he has no right to recover the moneys in dispute from the first

(1) See also *Thakore Fatesingji* v. *Bamanji A. Dalal*, (1903) 27 Bom. 515, at pp. 540 and 541, where Batty, J., has adopted this view of the law, relying upon the case of *Lalla Gopee Chand* v. *Saikh Liakut Hossein*, (1876) 25 W. R. 211.

(2) (1859) 4 H. & N. 549.

respondent, because, as held by Russell, J., the second respondent has a prior and superior right to them.

The second respondent claims the right to those moneys under a transfer to him by one Jakeria of an assignment from the third respondent. The facts in that connection are that, in consideration of Jakeria agreeing to renew *hundis* drawn by the third respondent in the event of non-payment thereof by the latter on their due dates, the third respondent gave on the 23rd of July 1906 "a lien or charge" to Jakeria on the moneys that might be recoverable from the first respondent by the third respondent out of the amount of the deposit now in dispute (see Exhibit 14). Jakeria at the instance of the third respondent assigned that lien to the second respondent by means of an endorsement (Exhibit 14A) made on Exhibit 14. The endorsement bears no date, but Russell J. has found on the evidence that it was made on the 26th of October 1906. The correctness of that finding has not been challenged before us; indeed Mr. Robertson for the appellant candidly admitted that he could not question it. On these facts then it is quite clear that the second respondent has a prior and superior right to the moneys in dispute which are in the hands of the first respondent.

But it is contended for the appellant that what the second respondent relies upon as the basis of his claim is not an assignment of the third respondent's right to recover the moneys from the first respondent but merely a lien or charge of those moneys, subject to a contingency which never occurred.

Now, it is true that by Exhibit No. 14 the third respondent gave to Jakeria what he calls a lien on the amount of Rs. 18,666 deposited by him to the first respondent and that by Exhibit No. 14A Jakeria or rather his authorised agent, Elias Buddha, purported to transfer that "charge" or "lien" to the second respondent. But the mere fact that the parties have described the transaction in each case as "a lien" or "charge" cannot deprive it of its real nature, if in substance the transaction was in the first instance an assignment by the third respondent to Jakeria of the right of the former to recover his moneys in the hands of the first respondent, and, in the second instance, a trans-

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fer of that assignment by Jakeria to the second respondent. The English cases cited before us as making a distinction between a charge and an assignment have no bearing on the question here, which must be decided solely with reference to the intention and conduct of the parties disclosed in the evidence and the provisions of the Transfer of Property Act. The transactions evidenced by Exhibit 14 and Exhibit 14A are substantially transfers of "an actionable claim" dealt with in Chapter VIII of that Act. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person, the words lien or charge have no meaning except as giving the latter a right to recove the debt from the debtor. The transaction is in reality one whereby the owner of what in English law is called a *chose in action* transfers it to another. And that is what the evidence in this case establishes to have been the intention of the parties to Exhibits 14 and 14A.

But it was said that, even assuming that Exhibit 14 was in substance an assignment of the third respondent's right to recover the moneys in the hands of the first respondent, its operation as such depended upon the former renewing the *hundis* of the latter to the extent of Rs. 15,000 and that only in the event of failure by the latter to pay the amount of such *hundis* on their respective due dates; that the *hundis* in question having been satisfied by the third respondent on their due dates, the contingency, on the happening of which alone the assignment was to take effect, having never occurred, the assignment had no operation. This argument assumes a state of things which is not supported by the evidence in the case. According to the third respondent, three *hundis* (Exhibit T.) having become due in July 1906, he requested Jakeria's authorised agent Elias (also called Buddha) to renew them, because the third respondent was unable then to satisfy the *hundis* by payment in cash. Elias Buddha wanted some security besides the endorsements on the *hundis* before he could agree to renew. And it was on that account that the third respondent executed the document, Exhibit 14, with the result that Elias Buddha on its execution renewed the *hundis*. This version of the transaction finds substantial corroboration from the evidence of the appellant

himself. He says that he knew that a letter (that is Exhibit 14) had been given by the third respondent to Jakeria on the 23rd of July 1906; that he himself might have prepared the draft of it; and that Jakeria renewed the *hundis* after he had got his letter of assignment.

It only remains to notice one further argument of appellant's Counsel. It is argued that when Jakeria was paid off, his assignment came to an end and that there was no right existing in virtue of Exhibit 14 which he could transfer to the second respondent. There, again, we must look into the evidence to see what really happened. The moneys which went to satisfy the third respondent's liability to Jakeria came from the pockets of the second respondent. The second respondent supplied the third respondent with those moneys on the distinct understanding that he was to step into the shoes of Jakeria. Accordingly Jakeria through his agent Elias Buddha transferred his right under Exhibit 14 by Exhibit 14A to the second respondent. These are the facts found by Russell, J., and the evidence, which he has rightly believed, supports them.

On the ground, therefore, that the second respondent's assignment, being prior in point of time to the appellant's, defeats the latter, we must confirm the decree of Russell, J., with costs. It was not suggested in the Court below nor has it been suggested in appeal that, after satisfying the second respondent's claim, there would be a balance of the deposit left in the hands of the first respondent to which the appellant would be entitled in virtue of his assignment. Before us, as it had been before Russell J., the appellant's case was fought out on the footing that if the second respondent's assignment was found to be prior in point of time to the appellant's, the latter must fail in the suit.

After the delivery of this judgment Mr. Robertson urges with reference to the last sentence that there would be a balance left, that on that ground his client had asked Russell J. for an order for an account to be taken and to marshal the securities in the hands of the second respondent. Nothing was said about this during the hearing of the appeal before us. In Russell

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J.'s judgment it is distinctly stated that it was admitted before him that if the second respondent's claim was prior he (the appellant) would get nothing. The correctness of that statement in the judgment was not at all assailed before us. And the appellant's deposition (page 82 of the paper book in appeal) confirms Russell J.'s remark as to the admission. We cannot in this state of the pleadings allow the case to be reopened, because that would be encouraging parties to argue their cases piecemeal and shift their grounds of claim so as to prolong litigation. Respondents to have separate sets of costs.

Decree confirmed.

Attorneys for appellant: Messrs. *Wadia, Ghandy & Co.*
Attorneys for defendant: Messrs. *Captain & Vaidya.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

BAI MOOLBAI *v.* CHUNILAL PITAMBER.*

1909.
March 23.

Contempt of Court—Notice of motion for committal—Service of notice—Personal service necessary—Service upon attorneys not sufficient—Appeal pending from order.

Where an application is made for committal of a person to jail for disobedience of the Court's order, it is necessary not only that the order should be served upon the defaulting party personally, but the notice to commit should also be similarly served upon him. Service upon the party's attorneys is not sufficient.

When proceedings are taken for committal of a person for contempt of a Court's order, the Court is not obliged to stay those proceedings merely because an appeal has been filed from such order.

Gordon v. *Gordon*(1) followed.

NOTICE of motion.

The defendant's attorneys were served with a notice of motion in the following terms:—

"Please take notice that on Monday next the 22nd instant or so soon thereafter as Counsel can be heard Counsel will move on behalf of the plaintiff before

* O. C. J. Suit No. 31 of 1909.
(1) [1904] P. 163.

the Hon'ble Mr. Justice Russell on the grounds of the affidavit of Shivshankar Dalsukram copy whereof is sent herewith for an order committing your client to jail for contempt of the Court he having failed to hand over to R. D. Sethna, Esquire, the Receiver appointed herein, the property in his possession of the estate of the late Ambaram Motichand in the plaint herein mentioned and for such other order as the Court may think proper to make and for costs. The affidavit in support of notice of motion is sent herewith."

This notice was served upon the defendant's attorneys on March 20th at 4 p. m.

J. D. Davar for defendant:—We submit that this notice cannot be heard because it has not been served upon the defendant personally. There are no Indian cases on the point, but the Court will follow the English practice which is laid down in *Mander* v. *Falcke*[1]; see also *Re Cunningham*[2] and Oswald on contempt (1892 Edition), pp. 106—110.

We also submit that this notice cannot be heard because we have not had four clear days' notice as provided for in the Rules and no leave has been obtained from the Court for service on short notice.

Lowndes for plaintiff:—The case of *Mander* v. *Falcke*[1] cited by the defendant is in our favour. That case lays down distinction between proceeding in attachment and in committal. Attachment proceedings are taken when the person sought to be attached neglects to do what he has been ordered to do; and committal proceedings are taken against a person who has done what he has been ordered not to do. In the former case personal service is not necessary. There is no such distinction made in the practice prevailing in India as obtains in England between these two kinds of proceedings. No authority has been quoted to contradict this by the other side.

We submit (1) If English law or practice on the point has been adopted out here our motion can be heard as it would correspond to attachment proceedings at England. (2) If the English law or practice does not apply then our motion is equally good, for, the authority quoted above can show no reason for differentiating between the two proceedings with regard to service of notice.

(1) [1891] 3 Ch. 488. (2) (1886) 55 L. T. 766.

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As to point of short notice we have not as yet brought on the notice of motion. Counsel for the defendants has merely raised points by way of demurrer, but we now ask for leave to have this notice of motion set down for hearing tomorrow.

[RUSSELL, J.:—I will deliver judgment on this question to-morrow and the defendant must be present in person.]

RUSSELL, J.:—The plaint in this suit was filed on the 18th January 1909 and the plaintiff is the daughter of one Ambaram Motichand, who left property of a very considerable value, and the defendant is the executor of his will. He is described in the plaint as a law-tout; but whether or not he is so I do not know. The suit is for the construction of the will in various particulars and also for an account.

On the 1st of March 1909, Mr. Sethna was appointed Receiver, which I apprehend implies with it that it would be the duty of the executor to hand over all the property of the deceased in his hands to the Receiver; and also an order was made restraining the defendant from dealing with the property of the deceased. It appears from the proceedings, which I have gone through, that the order for Receiver could not be served upon the defendant until the 19th of March 1909 and on the 20th of March the following notice was written by the plaintiff's attorneys to the defendant's attorneys :—

[His Lordship then read the notice as set out above and proceeded :—]

That notice is dated the 20th of March 1909 and it was served on the defendant's attorneys only and not upon the defendant; and on the 22nd March the notice came on for argument before me, when Mr. Davar for the defendant raised two objections to this notice. The last objection I will deal with first as it is the less important one. This objection is that four clear days at least had not elapsed between the service of the notice of motion and the day named for showing cause as directed by Rule 377 "unless the Court or a Judge gives special leave to the contrary." The way I read those words is that it is open to the Court or a Judge to give special leave to the contrary at any time. In any emergent matter where a notice of motion has been given for

less than four days, the Court, if it thinks fit, can give special leave under the Rule after such notice has been given; and, therefore, I do not think I ought to hold this objection of Mr. Davar to prevail. In my opinion this is a case in which the Court will be fully justified in not adhering to the strictness of that rule.

With regard to the other objection, however, it appears to me that different considerations must apply. A number of cases have been decided in the Bombay and Calcutta High Courts with reference to what the contempt of Court really is and with regard to its jurisdiction. Thus in one case, *Martin* v. *Lawrence*(1), it has been held that the jurisdiction of the High Court to imprison for contempt is a jurisdiction which it has inherited from the old Supreme Court and was conferred upon that Court by the Charters of the Crown, which invested it with all the powers and authority of the then Court of King's Bench and of the High Court of Chancery in Great Britain, and this jurisdiction has not been removed or affected by the Civil Procedure Code. To a similar effect is the case of *Navivahoo* v. *Narotamdas Candas*,(2) and also the leading case of *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court*(3); and as mentioned in Mr. Mulla's Civil Procedure Code (3rd Edition) the power to commit is "amongst the inherent powers" of the Court, a list of which is to be found at page 275 of that work.

It was held by the Privy Council, in *In re Pollard*(4) (which is referred to with approval in *Kashinath Vithal* v. *Daji Govind*(5)), that in their Lordship's judgment, "no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him, and that in the present case their Lordships are not satisfied that a distinct charge of the offence was stated, with an offer to hear the answer thereto, before sentence was passed." Therefore, it appears that the proceeding for contempt of Court is in the nature of a criminal offence; and to the same effect, as I read

(1) (1879) 4 Cal. 655.
(2) (1882) 7 Bom. 5.
(3) (1883) 10 Cal. 109.
(4) (1868) L. R. 2, P. C. 106.
(5) (1870) 7 Bom. H. C. R., A. C. J. 102.

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it, is the case of *In re Vallabhdas* (1)—which is an Insolvency case but the principle seems to be the same—where it was held (following *Ex parte Van Sandau*(2)) that in all criminal cases it is necessary that there should be a charge, a finding and a conviction, as a foundation for the sentence and that as there was no charge, the order for imprisonment was wrongly made.

While I am on this point, I may also refer to the case of *Balwantrao* v. *Ramchandra*,(3) where the Court say :—"It is admitted that the injunction of this Court was personally served on Ramchandra on the 28th April last." I refer to that for showing that evidently the Court was of opinion that in that case personal service on Ramchandra was necessary.

Now Mr. Lowndes for the plaintiff raised a very ingenious argument upon the case Mr. Davar referred to—the case of *Mander* v. *Falcke*(4). Mr. Lowndes said that that case showed that in England there was a distinction between "attachment" and "committal." That, no doubt, was so before the Judicature Act, and in *Callow* v. *Young*(5), it was held that attachment was the proper application in cases of omission and committal in cases of commission; that is to say, if a person did that which he was not entitled to do he ought to be committed, and if he did not do that which he was ordered to do he ought to be attached. In India I find no distinction has ever been drawn between "attachment" and "committal"; and committal being to my mind a serious matter, seeing that committal is in the nature of a criminal proceeding, it is of the greatest possible importance that all applications to commit a person for contempt of this Court's order should be served personally. *Mander* v. *Falcke*(4), it seems to me, is an authority to that effect and does not admit of the distinction upon the ground that Mr. Lowndes endeavoured to distinguish it and knowing what the practice is in this country, it seems to me, it is impossible to lay too great a stress upon the importance of the matters of this sort, because the power of committal is one of the most effectual powers—a power which the Court can exercise *brevi manu* and is the most powerful

(1) (1903) 27 Bom. 394.
(2) (1844) 1 Phillips 445 at p. 457.
(3) (1892) Unrep. Cri. Ca., . 615.
(4) [1891] 3 Ch. 4 8.
(5) [1887] 56 L. J. Ch. 690.

engine at its disposal. I can conceive no greater danger than if I were to hold that service of notice for committal of a person to jail was sufficient if it was served upon his attorneys alone. Further, another danger one has to bear in mind in this country is, that it is inconceivable that this Court would sanction notices being served upon attorneys of persons in a language which would probably not be understood by the latter; and I would be extremely sorry to commit a person for not obeying a notice of motion which was served upon his attorneys in a language which he did not understand and *non constat* that it was ever explained to him. And I think I am justified in holding that where an application is made it is necessary not only that the order should be served upon the defaulting party, but the notice to commit for disobedience thereof should also be served upon him. That has been the practice ever since the days of Lord Eldon and before that time.

It may, however, be said in the present case that the defendant ought to have protested at once and certainly it does not appear in his affidavit that he did protest; but Mr. Davar did raise the preliminary protest at once and said that he protested against this notice on the ground that it had not been duly served. Upon this point it must be remembered that it has been held over and over again that appearance is not a waiver of the objection on the ground of irregularity in a case affecting the liberty of the subject; and to the same effect will be found the rulings as to waiver in the Encyclopœdia of the Laws of England. A man appearing cannot be held to waive a question which relates to the validity or invalidity of an order.

On being informed that the defendant had appealed from my original order appointing Mr. Sethna Receiver, I was considerably impressed with that fact and thought that I ought not to make an order in this present matter but should wait until the appeal had been decided; but following the case of *Gordon* v. *Gordon*[1], in my opinion the fact of this appeal pending does not oblige me to stay further proceedings in the present matter. In that case Vaughan Williams, L. J., says:—

(1) [1904] P. 169.

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"If an order has been made in the exercise of the discretion of the Court, and some one who is oppressed, or thinks himself oppressed by that order, appeals, saying that the Court has exercised its discretion wrongly, that person, if he is in contempt, cannot be heard to say anything of the kind until he has purged his contempt. *Garstin* v. *Garstin*(1) is an instance of that kind."

Then he goes on :—

"But when you come to the case of a order which it is suggested may have been made without jurisdiction, if upon looking at the order one can see that that really is the gound of the appeal, it seems to me that such a case has always been treated as one in which the Court will entertain the objection to the order, though the person making the objection is in contempt."

That, therefore, draws the difference between an order made in the discretion of the Court and the case where the objection is that it is made without jurisdiction.*

W. L. W.

* Note :—At this stage Counsel informed the Court that an arrangement had been arrived at between the parties. [Ed.]

(1) (1865) 4 Sw. Tr. 73.

APPELLATE CIVIL.

Before the Honourable Mr. Chandavarkar, Acting Chief Justice, and Mr. Justice Heaton.

1909. *June* 21.

ISMALJI YUSUFALLI (ORIGINAL DEFENDANT 1), APPELLANT, *v.* RAGHUNATH LACHIRAM MARWADI (ORIGINAL PLAINTIFF), RESPONDENT.*

Salt Act (Bom. Act II of 1890), sections 11 and 47(1)—Salt pans—Lease under a license from Collector—Lessee not to sublet without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie.

Y obtained from Government a lease of certain salt pans to manufacture salt under a license. One of the conditions of the lease was that the lessee should not sublet the salt pans without the written permission of the Collector.

* Second Appeal No. 538 of 1907.

(1) Sections 11 and 47 of the Salt Act (Bom. Act II of 1890) are as follows :—

"11. No salt shall be manufactured and no natural salt and, except under the provisions of section 14, no salt-earth shall be excavated or collected or removed, otherwise than by the authority and subject to the terms and conditions of a license

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Without any such permission, however, Y sublet the pans to R who, as a security for the performance of the conditions of the sub-lease, deposited a sum of Rs. 1,000 with Y. The sub-lease was acted upon and on the expiration of its term R brought a suit for the recovery of the deposit from the representative of Y, the latter denied R's right to recover the deposit on the ground that it formed a consideration for an agreement which, having been forbidden by law, was illegal.

Held, dismissing the suit, that the defendant's plea should prevail. The real object and the necessary effect of the sub-lease was to enable the plaintiff to manufacture salt without a license in the guise of a sub-lease although that was forbidden by law and by the terms of the license.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Thana, with appellate powers, confirming the decree passed by J. H. Betigiri, Subordinate Judge of Bassein.

The plaintiff sued to recover Rs. 1,906 under the following circumstances:—

Yusufalli Tajbhoy, a resident of Bombay and father of defendant 1, obtained from Government, represented by the Collector of Salt Revenue for the Presidency of Bombay, a license for the manufacture of salt in four salt pans in the Thana District for a period of five years from the 1st October 1899. The license was taken in partnership with Lukmanji Sulemanji, defendant 2. Clause 9 of the license was as follows:—

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to be granted by the Collector in this behalf: Provided that no such license shall be necessary for any process of manufacture of salt on which duty has been paid.

47. Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license or permit obtained under this Act—

(*a*) manufactures, removes or transports salt; or

(*b*) excavates, collects or removes natural salt, or salt-earth;

and whoever:

(*c*) except in the exercise of some power or the discharge of some duty conferred or imposed upon him under this Act or any other enactment at the time in force, receives or, without lawful excuse, retains contraband salt knowing or having reason to believe the same to be contraband salt;

shall for every such offence be punished with fine which may extend to five hundred rupees, or with imprisonment for a term which may extend to six months, o with both.

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9. I shall not sublet the Agars or salt beds without permission from the Meherban Collector Saheb of Salt Revenue for the Presidency of Bombay; on breach of this condition, the lease should be cancelled and Agars should be taken over in their possession by the Government.

Afterwards Yusufalli Tajbhoy sublet two out of the four salt pans, without the permission of the Collector, to the plaintiff Raghunath Lachiram under an agreement dated the 10th September 1900. One of the conditions of the sub-lease was that the sub-lessee should keep a sum of Rs. 1,000 in deposit with the lessor.

Yusufalli died in October 1900, and his son defendant 1 got a fresh license from the Collector on the 13th January 1902. The term of the fresh license was three years commencing from the 1st October 1901 to the 30th September 1904. After the grant of the fresh license to defendant 1 the plaintiff obtained a fresh sub-lease from him on payment of Rs. 1,000 as deposit under the terms of the agreement dated the 10th September 1900. Defendant 1 passed a receipt to the plaintiff for the amount. After the expiration of the term of the license the defendants having refused to restore the amount of the deposit to the plaintiff, he, on the 20th October 1904, brought the present suit for the recovery of the amount, namely Rs. 1,000, together with interest, Rs. 96, alleging that it was obtained from him through coercion and praying in the alternative that if the refund of the amount could not be ordered for any reason, he should be awarded damages of Rs. 1,000 on account of the defendants having infringed the terms of the agreement, dated the 10th September 1900.

Defendant 1 urged *inter alia* that the Court had no jurisdiction to try the suit, that the sub-lease to the plaintiff dated the 10th September 1900, was forbidden by the terms of the license granted to his father by the Collector, that the same was therefore illegal and plaintiff could not claim any relief under it, that the plaintiff voluntarily and for his benefit took a fresh sub-lease and paid Rs. 1,000 by way of compromise, that there was no coercion practised as alleged in the plaint and that the claim was time-barred as the defendant's father died on the 11th October 1900 and as the license granted to the deceased by the Collector

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and the sub-lease to the plaintiff terminated on that day, while the suit was filed on the 20th October 1904.

Defendant 2 contended, in addition to the defences raised by defendant 1, that he was not a partner of defendant 1's father and that he had nothing to do with the plaintiff's sub-lease and the deposit of Rs. 1,000.

The Subordinate Judge found that the Court had jurisdiction to entertain the suit, that the plaintiff's sub-lease of the 10th September 1900 was contrary to the terms of Yusufalli's license, that the plaintiff paid Rs. 1,000 to defendant 1 on the 23rd September 1903 through coercion, that the suit was not time-barred and that defendant 2 was partner with the deceased father of defendant 1. He, therefore, awarded the claim as against both the defendants on the following among other grounds :—

On the strength of sections 12 and 47 of the Bombay Salt Act (II of 1890), it was contended before me that the sub-lease in Exhibit 42 was wholly illegal, inasmuch as under it, plaintiff was given the right to manufacture, remove, etc., salt, which were acts which a licensee alone could do and which, if done, by a stranger would entail on him the penalties in section 47 above. I cannot accede to this agreement as it is not a fair one and as it does not state the whole truth. For a man may do all or any of the acts penalised in section 47 above and without incurring the penalties, so long as he does so under the shelter of some license and under its protecting wings. The case would certainly have been otherwise if the licensee and he alone bodily were permitted under the license to do the things mentioned in section 12 above. But facts and every day experience are otherwise and point clearly to the contrary. Clause 19 itself of the leases in Exhibits 51 and 71 clearly lays down that other persons purporting to act on behalf of the licensee would be allowed to make vahivat in the salt beds and their acts would be treated as the acts of the licensee himself by the authorities of the Customs and Salt Department. It follows therefore that the said authorities would not recognize persons who claimed rights independent of the licensee or adversely to him or who were objectionable on any other grounds. In this very case it is admitted by defendants that plaintiff acting on behalf of defendant 1 and his father has successfully carried out the terms of the four years' agreement in Exhibit 42 and without in any way coming into conflict with the authorities of the Salt Department. Further clause 16 in Exhibits 51 and 71 expressly authorizes the executants in them to appoint their agents with powers-of-attorney, with a view to facilitate the sale and removal of salt, in cases where the licensee himself is unable to be personally present. As regards the law applicable to the case I follow I. L. R. 24 Bom. 622. It is not shown

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that the Salt Act of 1890 forbids subletting or that it attaches any penalty to such transaction. Section 13 of the said Act gives power, no doubt, to the Commissioner, subject to the directions of Government, to impose certain conditions in the license to be issued. Under one of the conditions so imposed in Exhibits 51 and 71, the executants in them were only liable to forfeit their leases for subletting them, in case the authorities thought fit to do so for administrative purposes. The Salt Act (1890), I need hardly say, is passed for the benefit of the revenue, as is the Act imposing tolls considered in the decision above quoted. A reference to sections 7 and 10 of the Tolls Act will bring into relief the analogy this case bears to the one quoted. I, therefore, find that the contract in Exhibit 42 is not illegal and that the present suit is maintainable.

On appeal by defendant 1 the decree was confirmed. With respect to clause 9 of the license the Judge in appeal made the following observations :—

The contract to sublet was certainly prohibited by the terms of the license or lease in favour of Yusufally Exhibit 71, clause 9, and again by similar paragraph in Exhibit 51 which was executed in 1902 by defendant in renewal of his deceased father's agreement. The prohibition, however, is not absolute and may be removed by the Collector of Salt Revenue for Bombay. The only penalty imposed was that if any pans were sublet to a third person without the Collector's permission the license was liable to be recalled and the lands to be resumed. Though the plaintiff manufactured and sold the salt in the two salt pans of Bhati and Juna for four years without the contract under Exhibit 42 having been sanctioned by the Collector no objection was raised by the authorities concerned.

I am not convinced that the combined effect of sections 11, 12 and 47 of Bombay Act II of 1890 is to render the contract contained in Exhibit 42 illegal, the prohibition against subletting and alienations in other ways contained in clause 5 of the parwanas 90 to 93 without the Collector's permission appears to be re-affirmation of the term in clause 9 of Exhibits 71 and 51 and does not appear to render the contract to sublet illegal or criminally punishable, and this case is rightly held by the lower Court as falling within the rule enunciated in the decision on page 622, I. L. R. 24 Bom.

Defendant 1 preferred a second appeal.

H. C. Coyaji with *G. K. Dandekar* for the appellant (defendant 1) : —We submit that the view taken by the lower Courts as regards the sub-lease is not correct. The plaintiff undertook to manufacture salt under the sub-lease on his own account. He was to pay us the sum of Rs. 14,000 and odd per year and to manufacture salt at his own expense. He admitted in his deposition that he was the owner of profit or loss. Thus the

plaintiff's act of manufacturing or selling salt without a license from the Collector was contrary to section 11 of the Salt Act. The object of both the parties in granting and accepting the sub-lease was to enable the plaintiff to manufacture and sell salt in contravention of the Salt Act. Such manufacture or sale is made punishable by section 47 of the Act.

The object of the sub-lease was illegal under section 23 of the Contract Act as being forbidden by the Salt Act. It was of such a nature that it defeated the provisions of the Salt Act. There is no case decided under the Salt Act, but we rely on the principle of the rulings in *Hormasji Motabhai* v. *Pestanji Dhanjibhai*[1], *Raghunath Lalman* v. *Nathu Hirji Bhate*[2] and *Gopalrao* v. *Kallappa*[3].

V. B. Pradhan for the respondent (plaintiff):—We contend that our sub-lease was not in contravention of the original lease within the terms of section 47 of the Salt Act. We got authority to manage two salt pans under the original lease and all our acts were protected by that lease. Besides such a sub-lease is recognized by the Salt Department itself as observed by the lower Court. The rulings quoted have no bearing on the present case as they were cases under the Abkari and Opium Acts. The Salt Act is an Act for fiscal purposes and there is no personal element involved in granting a license under that Act as in the other two. The present case is governed by the principle laid down in *Gauri Shankar* v. *Mumtaz Ali Khan*[4] and *Bhikanbhai* v. *Hiralal*[5]. The latter case is stronger on facts than the present. The condition against subletting is for the benefit of Government, but the licensee is bound by the sub-lease. The subletting can at the most be treated as a breach of the condition attached to the license. Whenever the Legislature want to penalize such a breach of condition, they explicitly say so.

Compare the wording of section 45, clause (*c*), of the Abkari Act (V of 1878). A similar provision is not made in the Salt Act which merely prescribes the penalty of the forfeiture of the

(1) (1887) 12 Bom. 422.
(2) (1894) 19 Bom. 626.
(3) (1901) 3 Bom. L. R. 164.
(4) (1879) 2 All. 411.
(5) (1900) 24 Bom. 622.

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license. Government did not forfeit the defendant's license though they were aware of the management by us.

Granting that no one but the original licensee or his manager can manage the salt pans under the Salt Act, then we say that our management was on behalf of the original licensee because our agreement with the original licensee, Exhibit 42, contains a clause that we were to hold a power-of-attorney from him and that shows that we were to be his *vahivatdars* under the Act.

CHANDAVARKAR, Ag. C. J.:—The facts in this second appeal are shortly these:—One Yusufalli, father of the appellant, obtained from Government a lease of certain salt pans under a certain license, one condition of which was that the lessee shall not sublet the salt pans without the written permission of the Collector. Without any such permission, however, Yusufalli sublet to the respondent, who, as security for the performance of the conditions binding on him under the sub-lease, deposited a sum of Rs. 1,000 with Yusufalli. The respondent accordingly entered on possession of the salt pans under his sub-lease. Some time after that, Yusufalli having died, the appellant, his son, obtained a fresh lease with a fresh license from Government and the respondent obtained a sub-lease from the appellant on the same terms as those contained in the sub-lease obtained from Yusufalli. For this sub-lease the appellant had obtained no permission from the Collector as required by the license. The respondent deposited a sum of Rs. 1,000 with the appellant to secure the performance by him of the conditions of the new sub-lease; the sub-lease was acted upon; its term expired; and the respondent paid all that was due under it to the appellant. The suit out of which the second appeal arises has been brought by the respondent to recover the deposit of Rs. 1,000, because the appellant denied the respondent's right to that amount on the ground that the amount in question formed a consideration for an agreement, which, having been forbidden by law, was illegal. This was the defence to the action raised in both the Courts below and it has failed there.

The ground on which both those Courts have proceeded in overruling the plea of illegality is that the contract to sublet is not

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absolutely prohibited by the license granted by the Collector to the appellant. But that view of the dealing between the parties ignores the real nature and object of the deposit to recover which the present suit was brought.

Under section 11 of the Salt Act (Bombay Act II of 1890) the manufacture of salt without a license is prohibited subject to a proviso which is not material to our purpose here. Section 47 of the Act makes such manufacture an offence and renders any person committing it liable to punishment.

The real object and necessary effect of the agreement between the appellant and the respondent was to enable the latter to manufacture salt without a license in the guise of a sub-lease, although that was forbidden by law and by the terms of the license.

These facts support the application to this case of the principle of law enunciated by this Court in *Hormasji Motabhai* v. *Pestanji Dhanjibhai*[1] and *Raghunath Lalman* v. *Nathu Hirji Bhate*[2].

But a point is raised for the first time in the second appeal by the learned pleader for the respondent. He states that his client manufactured salt not only under a sub-lease but also as manager under a power-of-attorney from the appellant. This case was not made in the Court below; and there is no evidence in support of it. Even if there had been, it is difficult to see how the power-of-attorney could have helped the respondent's case as *ex concessionis* it existed side by side with the sub-lease. The illegal object of the transaction being clear upon the facts, the power-of-attorney could only have proved that by means of it the parties intended to disguise the real object of the agreement and defraud the Government.

The decree must be reversed and the claim rejected. Each party to bear his own costs throughout.

HEATON, J.:—I agree that the decree must be reversed and the claim rejected.

(1) (1887) 12 Bom. 422. (2) (1894) 19 Bom. 626.

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It was assumed by the lower Court that the agreement was an agreement to sublet certain salt-pans, which was prohibited by the license which Yusufalli obtained, and we must take it that that is so. In the lower Court it was contended otherwise, but now it has been sought to establish that the plaintiff acted on behalf of defendant No. 1 and not on his own account. That, however, is a question of fact. It was not made good in the lower Court and we cannot go into it here. The question, therefore, is whether the object of the agreement is forbidden by law within the meaning of section 25 of the Contract Act. It seems to me that it is, for the object was to enable the plaintiff to manufacture salt without a license, and the law says that no salt shall be manufactured otherwise than by the authority of a license granted by the Collector.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Beaman.

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KISANDAS RUPCHAND AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* RACHAPPA VITHOBA SHILWANT AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings —Defence of the bar of limitation—Practice as to amendment of plaint.

The plaintiffs alleging that in pursuance of a partnership agreement they delivered Rs. 4,001 worth of cloth to defendants, sued for an order for the dissolution of the partnership and accounts. The Subordinate Judge found that the plaintiffs did deliver Rs. 4,001 worth of cloth to the defendants as alleged; but he came to the conclusion that no partnership was created and held that the suit as framed would not lie. The plaintiffs appealed mainly on the ground that the partnership had been created and that the suit was in order. When the appeal came on for hearing this plea was abandoned; the plaintiffs admitted that the facts stated in their plaint did not constitute a partnership and prayed for leave to amend by adding a prayer for the recovery of the Rs. 4,001. At this date the claim for the money was barred by limitation.

* Second Appeal No. 23 of 1908.

The lower appellate Court being of opinion that the plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their Pleader, allowed the amendment to be made and ultimately allowed the plaintiffs' claim. The defendants in appeal to the High Court contended that the amendment was wrongly allowed.

Held, that the amendment was rightly allowed. The defence of limitation was a defence to which the defendants were never fairly entitled, and the allowance of the amendment only withdrew from them an advantage which they ought never to have received.

Per BATCHELOR, J.:—Under the Civil Procedure Code, 1908, O. VI, *r.* 17, all amendments ought to be allowed, at any stage of the proceedings, which satisfy the two conditions (*a*) of not working injustice to the other side, and (*b*) of being necessary for the purpose of determining the real questions in controversy between the parties.

Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused: to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not?

SECOND appeal from the decision of Vaman M. Bodas, First Class Subordinate Judge, A. P., at Sholapur, reversing the decree passed by Naginlal Venilal Desai, Subordinate Judge at Karmala.

Rachappa and another sued for dissolution of partnership and accounts.

On the 30th April 1897, the plaintiffs agreed with the defendants to start a partnership named "Yeshwant Kisandas" from the 26th October 1897. The agreement provided that the defendants were to be solely responsible for the firm and the plaintiffs had to supply a capital of Rs. 4,001 to defendants and to receive Rs. 351 a year in lieu of interest and profits. This arrangement was to last for five years, that is, till the 1st of November 1902. The defendants had then to return Rs. 3,001 in cloth and cash, and the remaining Rs. 1,001 were to be returned on the 8th November 1904.

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The defendants having failed to carry out their obligations under the above agreement, the plaintiffs filed this suit for dissolution and accounts of the partnership on the 28th March 1905.

The defendants in their written statement denied the agreement and contended that even if the agreement had been executed, plaintiffs were only to get under its terms a fixed sum and hence there was no need to ask for dissolution and accounts.

The Subordinate Judge found that there was an agreement between the parties to start business in the name of Yeshwant Kishandas, but the agreement did not amount to partnership in the legal sense of the term. He also found that plaintiffs had delivered Rs. 4,001 worth of cloth to defendants as agreed. The plaintiffs' suit was therefore dismissed.

The plaintiffs appealed contending that partnership was established and that he was entitled to maintain his suit.

When, however, the appeal came on for hearing, the appellants' pleader admitted that the facts stated in the plaint did not constitute a partnership between the parties, and said that the only relief which the plaintiffs were legally entitled to obtain was a decree for Rs. 4,001 advanced by them with interest. He applied to amend the plaint accordingly.

The learned Judge of the appeal Court allowed the amendment on the 7th October 1907, on the following grounds:—

"The proposed amendment does not necessitate a change in the nature of the suit, or addition of anything to facts stated in the plaint as constituting the cause of action, but the mere addition of an alternative relief only. This relief, there seems no doubt, could very well have been claimed in the plaint as originally framed. The application and affidavit make it clear that plaintiffs wished to sue for their money only, and had no desire to evade payment of proper stamp duty, but that they were induced to sue for the dissolution of a supposed partnership and accounts by the ill-advice of their Vakils. I therefore decide to allow the plaint to be amended in the manner proposed more especially as limitation is likely to come in the plaintiffs' way if they now bring a fresh suit on the cause of action stated by them in the plaint."

The appeal was then heard on its merits: and the decree passed by the lower Court was revised and the plaintiff's claim as amended was allowed.

The defendants appealed to the High Court.

H. C. Coyaji (with *J. R. Gharpure*) for the appellant:—We submit the lower appellate Court ought not to have allowed the amendment, because it would deprive us of our right to plead limitation as a bar to the plaintiffs' suit as now changed. See *Weldon* v. *Neal*[1]; *Mallikarjuna* v. *Pullayya*[2]; *Alagappa Chetti* v. *Vellian Chetti*[3] and *Damodar Madhowji* v. *Purmanandas Jeewandas*[4].

There was no *bonâ fide* mistake in the form of the suit in which it was originally brought. But it was so brought, first to avoid payment of full Court-fees and, secondly, to avoid the bar of limitation, for the cause of action accrued on the 26th October 1897.

The objection as to the form of the suit was first taken in our written statement. Still the plaintiff elected to carry on the suit as originally framed in the first Court and it was at a very late stage in the lower appellate Court that he applied for amendment. The amendment should, therefore, have been refused; see *Narayana* v. *Shankunni*[5].

Further the amendment should not have been allowed, because (1) it changes the character of the suit: see *Mallikarjuna* v. *Pullayya*[2] and *Weldon* v. *Neal*[1]; and (2) it changes jurisdiction: see *Bai Shri Majirajba* v. *Maganlal Bhaishankar*[6]; *Hari Sadashiv* v. *Shaik Ajmudin*[7]; at any event, we should have been allowed to adduce fresh evidence: see *Hari Sadashiv* v. *Shaik Ajmudin*[7].

Setalvad (with *G. K. Dandekar*) for the respondents:—It is discretionary with the Court to allow an amendment of the plaint: that discretion is limited by the rule that the amendment should not convert a suit of one character into a suit of another and inconsistent character: see section 53 of the Civil Procedure Code (Act XIV of 1882), and *Balkrishna* v. *Gangabai*[8].

(1) (1887) 19 Q. B. D. 394.
(2) (1892) 16 Mad. 319.
(3) (1894) 18 Mad. 33 at pp. 37, 38.
(4) (1883) 7 Bom. 155 at p. 160.
(5) (1891) 15 Mad. 255 at pp. 257, 258.
(6) (1894) 19 Bom. 303.
(7) (1886) 11 Bom. 235.
(8) (1896) P. J. 617.

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Upon facts, the amendment was properly allowed in this case. The plaint as originally framed clearly set forth the agreement and based the cause of action upon it. The purpose of the suit was the enforcement of the terms of the agreement. And this purpose has been quite kept in view by the amendment which involves no change of venue.

BATCHELOR, J.:—On 28th March 1905 the suit out of which this appeal arises was instituted, the plaintiffs claiming an order for the dissolution of an alleged partnership and accounts. It was stated in the plaint that, in pursuance of the partnership agreement, the plaintiffs had brought in Rs. 4,001, as capital which was repayable, as to Rs. 3,001, on 1st November 1902, and as to the remaining Rs. 1,000, on 8th November 1904.

The substantial defences were that the alleged partnership was never agreed to or undertaken, and that the plaintiffs never contributed Rs. 4,001 or any other sum as capital.

The Court of first instance raised several issues, and dismissed the suit on the grounds that no partnership was created and that the suit as framed would not lie. The learned Subordinate Judge found as a fact that the plaintiffs did deliver to the defendants Rs. 4,001 worth of cloth; "but," he says, "that is no reason why plaintiff should get relief in this suit. He made an experiment about his being a partner probably to avoid the payment of larger Court-fees, as is suggested by the defendant in his written statement; he has failed to prove his case as brought, and did not ask to amend it, and I have no alternative but to dismiss it with all costs." From this determination the plaintiffs appealed, grounding their appeal on the contention that the partnership had been created and that the suit was in order. But this contention was abandoned when the appeal came on for hearing, and the plaintiffs, then represented by a new pleader, admitted that the facts stated in their plaint did not constitute a partnership, and prayed for leave to amend by adding a prayer for the recovery of the Rs. 4,001. The learned Subordinate Judge of the lower appellate Court, being of opinion that the plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their pleader, allowed the amend-

ment to be made and ultimately decreed the plaintiffs' claim for the Rs. 4,001 and a portion of the interest. His judgment allowing the amendment is dated 7th October 1907 and at this date the claim for the Rs. 4,001, or at least for the greater part of it, was barred by the law of limitation.

From this decision the defendants have preferred the present appeal, and the only question involved is whether the lower Court's order allowing the amendment of the plaint should be disturbed. For the appellants it is urged that the amendment should have been refused because the effect of allowing it was to deprive the defendants of their defence of limitation, the debt, as I have said, being barred at the date of the amendment. But in order to pronounce upon the validity of this contention, it is, I think, necessary to examine a little more closely the particular facts of this case in the light of the accepted principles which govern the admissibility of amendments.

As to the principles I think there is no room for doubt: they are contained in O. VI, *r.* 17 of the Code, which is substantially identical with O. XXVIII, *r.* 1 of the English Rules of the Supreme Court. From the imperative character of the last sentence of the rule it seems to me clear that, at any stage of the proceedings, all amendments ought to be allowed which satisfy the two conditions (*a*) of not working injustice to the other side, and (*b*) of being necessary for the purpose of determining the real questions in controversy between the parties. Upon the record before us there can be no doubt that this second condition is satisfied here, nor was this point challenged for the appellants. It remains to consider whether the allowance of the amendment worked injustice to the defendants. Upon this question *Weldon* v. *Neal*[1] was cited for the appellants. Reference may also be made to *Tildesley* v. *Harper*[2]; *Clarapede & Co.* v. *Commercial Union Association*[3], and *Steward* v. *North Metropolitan Tramways Co.*[4]; but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendments should be refused

(1) (1887) 19 Q. B. D. 394.
(2) (1878) 10 Ch. D. 393 at p. 396.
(3) (1883) 32 W. R. 263.
(4) (1885) 16 Q. B. D. 178; C. A. p. 556.

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only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not? And this becomes clearer if the cases are examined. For the reason already given I shall notice only two. In *Weldon* v. *Neal*[1] the original action was simply for slander, and the plaintiff was non-suited. Later she sought to amend her claim by setting up, in addition to the claim for slander, fresh claims in respect of assault, false imprisonment and other causes of action, which at the time of such amendment were barred by limitation though not barred at the date of the writ. Here, then, the amendment sought to set up fresh claims, claims which had never been heard of until they had become barred; yet even in so strong a case as this Lord Esher M. R. in refusing leave to amend, intimated that the decision might have been the other way if there had existed special circumstances to justify it. *Steward* v. *North Metropolitan Tramways Co.*[2] seems to me to proceed on the same principle: there the defendants sought to amend their written statement, as we should call it in India, by pleading that the liability for the plaintiff's injuries rested, not with them, but with a third party, the vestry, against whom the plaintiff's right of action was by that time barred. Leave was refused because the application was too late: no such plea had even been brought to the plaintiff's notice until his action against the vestry was barred, and Lord Esher observes that "If the defendants had in the first instance pleaded as they now ask to be allowed to plead, the plaintiff could have discontinued his action against the defendants, and then have given

(1) (1887) 19 Q. B. D. 394. (2) (1885) 16 Q. B. D. 178: C. A. p. 556.

notice of action and brought an action against the vestry." Lindley, L. J., uses language to the same effect. The principle is the same as in *Weldon's* case; leave is refused because the plea sought to be added is not heard of until rights have accrued under the law of limitation.

If this is a right view of the cases, they have, in my opinion, no bearing on the present facts; or, rather, they bear against the appeal. In order that these decisions should serve the appellants' turn it would be requisite that the allowance of the amendment should prejudice them by barring the defence of limitation otherwise fairly open to them; but how can that be said of a claim which, before the bar of limitation had arisen, had been regularly pleaded to by them, had been formally put in issue, and had been decided against them after consideration of all the evidence which they had offered in defence? If at the time of the amendment the appellants had any show of argument based on the law of limitation, that seems to me to have been occasioned less by the incompleteness of the plaint than by the excessive technicality of the trying Court. In other words the defence of limitation was a defence to which the appellants were never fairly entitled, and the allowance of the amendment only withdraws from them an advantage which they ought never to have received.

If that is so, the cases quoted do not assist the appellants in the particular facts of this appeal, but rather tend the other way. Falling back, then, upon the words of the Rule, I cannot follow the argument that there would be any injustice to the appellants in allowing the amendment, for the only effect of it is to enforce their liability for a debt which was claimed, disputed, and found to be due long before the defence of limitation was available. It is true that, though the Subordinate Judge found the sum to be due, he refused to decree it, because, in his opinion, the suit was wrongly framed and the plaintiffs had not then asked to amend; but I cannot regard this circumstance as of sufficient weight to displace the other considerations to which I have referred. In my opinion the Subordinate Judge would have exercised a sounder discretion if he had awarded the sum found due, notwithstanding the inexpertness of the pleadings,

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and sufficient warranty for that procedure might have been found in the principal plaintiff's own statement, which, as cited by the Subordinate Judge himself, was as follows: "I had nothing whatever to do with the dealings of the shop. All I was to have was Rs. 351 yearly in lieu of goodwill and interest on my Rs. 4,001. . . . If my Rs. 4,001 are returned, and if I am paid Rs. 351 as agreed, I have no dispute." It is difficult to imagine how the plaintiff could have more clearly professed that, whatever may have been the attitude of his obstinately unskilful pleader, he for his part had no concern with the alleged partnership, but was suing simply to recover his debt. I think, therefore, that the Subordinate Judge would have been well advised if he had paid more attention to the substance of the suit before him, and taken command of it himself rather than handed over the conduct of the suit to a manifestly inexpert pleader; had he taken this view of his duty as presiding Judge, the slight technical difficulty which stood in his way would have been easily removed. Be that as it may, it was open to the lower appellate Court to allow the amendment; and that has been done in England whether leave to amend was asked for in the Court below or not, and even where the Court below offered leave to amend, and the offer was declined: See *Ecklin* v. *Little* [1]. In this context it is important to observe that the lower appellate Court which is the ultimate Court of fact, did not adopt the Subordinate Judge's view as to the plaintiffs' desire to sue cheaply at whatever risk; on the contrary it found "it clear that the plaintiffs wished to sue for their money only, and had no desire to evade payment of proper stamp duty, but they were induced to sue for the dissolution of a supposed partnership and accounts by the ill-advice of their Vakils." I do not use this finding as essential to my decision, though it is at least arguable that facts of this sort would suffice to constitute the "peculiar circumstances" which Lord Esher excepted in his judgment in *Weldon* v. *Neal* [2]; for, in my opinion, the Court below in allowing the amendment was perfectly right in the strictest view of the principles and practice of the Courts. In

(1) (1890) 6 T. L. R. 366. (2) (1887) 19 Q. B. D. 394.

my opinion not only was there no injustice to the defendants in allowing the amendment, but there would have been injustice to the plaintiffs in refusing it.

I must add that the case appears to me to afford an instance of that undue technicality, that excessive attention to form and deficient attention to "the real questions in controversy between the parties," which occasionally besets our Subordinate Courts, and hampers the success of their work in a country where competent legal advice is not always readily obtainable. I do not for a moment suggest that forms should be disregarded, and I admit that no hard and fast line can be drawn for all cases, but it does seem to me that the importance of forms is sometimes set in very incorrect perspective so that on occasions the trial of a suit is apt to wear too much the appearance of a game of skill in points of procedure and too little the appearance of a resolute attempt by the presiding Judge to come at justice on "the real questions in controversy between the parties." There must of course be no over-reaching or surprise of one party by the other and it is very important that parties should be kept to their pleadings, and not allowed to alter their case according to their shifting interest in Courts of appeal; but this is pre-eminently a reason why the trying Court should spare no pains to ascertain precisely the real character of the dispute and of the case made by each party. Nothing, I think, is more calculated to imperil the justice of a case than negligence or carelessness in these essential preliminaries, as nothing conduces more to a right decision than to have these points firmly determined at the outset.

Subject to these and similar considerations, the mofussil Courts would, I think, do well to bear in mind that the rules of procedure have no other aim than to facilitate the task of doing justice. On this subject the following words of Lord Penzance in *Kendall* v. *Hamilton* [1], should have perennial interest for Subordinate Judges trying original suits: "Procedure," said his Lordship "is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of

(1) (1879) 4 App. Cas. 504 at p. 525.

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facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve." Directions not less emphatic and of even closer application to the subject under notice were conveyed by the Judicial Committee in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1), where their Lordships lay down "that it is of the utmost importance to the right administration of justice in these Courts," that is, the Courts in India, "that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute." It seems to me that in this case, as occasionally in other cases, these imperative directions have been somewhat lost sight of; and I have thought it well again to call attention to their importance.

I am of opinion that this appeal fails and should be dismissed with costs.

BEAMAN, J.—I will state shortly what I conceive to be the true principle which has governed English Judges in exercising the discretion reposed in them by the Orders and Rules of the Supreme Court corresponding with our O. VI, *r.* 17.

The question was recently fully and ably argued before me on the Original Side of this Court, and examined and answered, to the best of my ability in an exhaustive critical judgment. See *Nandlal Thakersey* v. *The Bank of Bombay* (2).

After carefully reconsidering the whole question for the purposes of this case I have found no sufficient reason for departing from or modifying any part of the conclusions I then reached.

(1) (1856) 6 Moo. I. A. 393 at pp. 410-411. (2) (1909) 11 Bom. L. R. 925.

A careful analysis of the leading English cases seem to me to yield this result. Amendments of pleadings will always be allowed, unless allowing the amendment will place the other party at a disadvantage for which he cannot be adequately compensated by costs. That is a rule of practice, or as one of the great English Judges prefers to call it, a rule of conduct, not of positive law. And while usually adhering to it, the English Courts have been careful to distinguish its essential character, from a rule of positive law, which must be obeyed in all cases. Thus it has been observed that notwithstanding the salutariness and general correctness of the rule, it is always open to exception where the circumstances of a particular case are very peculiar.

In my opinion two simple tests, and two only, need to be applied, in order to ascertain whether a given case is within the principle. First, could the party asking to amend obtain the same quantity of relief without the amendment? If not, then it follows necessarily that the proposed amendment places the other party at a disadvantage, it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances, can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed. I prefer to state the principle, and the tests by which its application can be ascertained, in the simplest and widest terms. Because the dicta of the most eminent judges in some of the leading cases appear to me to refer to the particular facts, and when wrested from their appropriate context, and sought to be used as universal propositions, rather to obscure the true principle. Thus I question whether the introduction of such a factor as the claim being a fresh claim can logically be made to express the principle in its completeness, as applicable to all cases. Great prominence was given to this factor, in *Weldon* v. *Neal* [1], as was natural in the facts of that case. But I cannot escape the feeling that in a sense, every amendment which Courts are asked to allow, must

[1] (1887) 19 Q. B. D. 94.

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introduce a "fresh," that is to say a changed, or different, if not an additional claim or defence. Put at the lowest, every such amendment seems to me to bring forward an old claim in a new form. If this were not so, it would not be necessary to amend at all. If then the "freshness" of the claim introduced by the amendment is to be sought as a determinant of the Courts' discretion, in granting or refusing it, and not the disadvantage or injury it inflicts on the other party, I should feel a real difficulty in reconciling the practice with the principle. For the practice is to allow all amendments, whether introducing fresh claims or not, so long as they do not put the other party at a disadvantage for which he cannot be compensated by costs. The words of O. VI, *r.* 17 are very wide. They authorize Courts to allow amendments whenever, in the opinion of the Judges, it is just that this should be done. So that we are thrown back on some consistent criterion of justice, in the average circumstances of such applications. And in order to systematize the practice and not allow too much latitude to individual Judges' notions of justice, the English Rule appears to me to have been founded on the broad principle, tested by the two simple uniform tests, I have stated.

If I am so far correct, it would follow that *primâ facie* this case is within the rule. But I agree with my learned brother that its circumstances are so peculiar that it may properly be excepted. I therefore concur in the decree which he has proposed.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before the Honourable Mr. Chandavarkar, Acting Chief Justice, and Batchelor and Heaton, JJ.

KRISHNAJI NARAYAN HARDIKAR (APPLICANT) *v.* BALKRISHNA VENKATESH PHADKE (OPPONENT).* 1909. *July* 2.

Relinquishment of claim by reversioner—Release—Stamp.

The relinquishment of his claim by a reversioner is a release and must be stamped accordingly.

Reference by W. T. Morison, Commissioner, Central Division, under section 57 of the Stamp Act (II of 1899).

The circumstances which gave rise to the reference were as under—

On the 3rd December 1908 one Balkrishna Venkatesh Phadke passed a "consent paper" in favour of Krishnaji Narayan Hardikar as follows :—

I pass this consent paper for a reason as follows :—Chiranjiv Gangabhagirathi Bhagirathibai, widow of Kashinath Lakshman Phadke, who was my cousin, did, at the request of her father-in-law, pass to you as gift the undermentioned house of the value of Rs. 400 at the time of his exequial ceremonies, *i.e.*, on the 25th of April 1903. The particulars of that house are as follows :—

* * * * * *

The house thus described above and enclosed within the aforesaid boundaries, together with the things appertaining thereto, has been given to you as a gift. The same is agreed to and approved of by me. I duly pass this consent paper to you.

* * * * * *

The above consent paper is passed by me without taking any consideration for it. Now, excepting yourself, neither myself nor my heirs and representatives have any manner of right or claim left over or to the same.

A question having arisen as to what was the proper stamp duty to the said document, the Sub-Registrar of Sholapur was of opinion that it did not fall under section 4 of the Stamp Act, as that section applies to sales, mortgages or settlements. He was

* Civil Reference No. 3 of 1909.

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further of opinion that the deed was either a gift of reversionary interest or a release of that interest. Being thus doubtful on the question, he referred it to the Commissioner, Central Division, through the Collector of Sholapur under section 56 of the Stamp Act. In forwarding the reference to the Commissioner under section 40 of the Stamp Act, the Collector agreed with the view of the Sub-Registrar that section 4 of the Stamp Act was not applicable but he was doubtful whether the document was a deed of gift or a deed of release of reversionary interest.

The Commissioner, thereupon, made a reference under section 57 of the Stamp Act in the following terms :—

The chief question is whether the deed of consent in question is a gift or a release. In my opinion the document cannot be a gift, as Balkrishna has no existing interest in the property in question. (*Vide* definition of gift on page 254 of Desai's Stamp Act.) The document appears to be a release on the analogy of the case at I. L. R. 24 Allahabad 372, and the Madras Board's Proceedings No. 340 of 25th February 1881, printed on page 304 of Desai's Stamp Act.

G. S. Rao, Acting Government Pleader, appeared for the Government of Bombay.

PER CURIAM.—The Court agrees with the Commissioner and holds that the relinquishment of his claim by the reversioner is a release and must be stamped accordingly.

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Beaman.

1909. *July* 5.

DAGDU VALAD SAKHARAM KUNBI (ORIGINAL PLAINTIFF), APPELLANT, *v.* TOTARAM VALAD NARAYAN KUNBI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Court Fees Act (VII of 1870), section 7, clause (iv) (*b*), *section 7, clause* (v), *—Suits Valuation Act (VII of 1887), section 8—Suit for partition and separate possession of joint family property—Valuation for Court fee purposes—Market value of subject matter determines jurisdiction—Jurisdiction.*

* Appeal No. 3 of 1909, from order.

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The plaintiff sued for partition of certain houses, house-sites, moveables and lands, valuing his share in the lands at five times the assessment (*i. e.*, at Rs. 489-6-0) for Court fee purposes and in the moveables at Rs. 1,455-8-0. The market value of the plaintiff's share in the lands was Rs. 5,600. The plaint was presented in the Court of First Class Subordinate Judge, as the value of the plaintiff's share was over Rs. 5,000. The Subordinate Judge held that the value for Court fees, that is, Rs. 1,944-14-0 should be treated as the value for jurisdiction under section 7, clause (iv) (*b*) of the Court Fees Act, 1870 and section 8 of the Suits Valuation Act 1887 and returned the plaint for presentation in the Court of Second Class Subordinate Judge.

Held, reversing the orders that the suit fell within the jurisdiction of the First Class Subordinate Judge.

Held, further, that the suit fell not within section 7 (iv) (*b*) but under section 7 (v) of the Court Fees Act 1870 and section 8 of the Suits Valuation Act 1887 did not apply. That, therefore, it was the market value of the lands, houses, &c., that determined the jurisdiction of the Subordinate Judge.

Motibhai v. *Haridas* (1) commented on.

APPEAL from order passed by N. R. Majmundar, First Class Subordinate Judge at Dhulia.

Suit for partition.

The plaintiff sued to recover by partition a moiety of certain moveables, houses, house-sites and lands. The value of the plaintiff's share in moveables, houses and house-sites was put at Rs. 1,455-8-0 for Court fee purposes; and in lands at Rs. 489-6-0 at five times the assessment. The market value of plaintiff's share in the fields was about Rs. 5,600.

The plaint was presented originally in the Court of the Second Class Subordinate Judge at Jalgaon. The defendant contended that the market value of the field was undervalued in the plaint. The question was therefore referred to a Commissioner, who found the market value of the plaintiff's share in the fields to be Rs. 7,055-8-0.

The Second Class Subordinate Judge of Jalgaon thereupon returned the plaint to be presented in the proper Court, as the market value of the subject matter in suit was more than Rs. 5,000.

(1) (1896) 22 Bom. 315.

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The plaint was next presented to the Court of the Subordinate Judge at Dhulia: but the learned Judge held that as the value for Court fee purposes of plaintiff's share did not exceed Rs. 5,000, the plaint should be re-presented in the Jalgaon Court. His reasons were as follows:—

It has been held in I. L. R., 22 Bom. 315 that the valuation placed by the plaintiff for the purposes of computing Court fees also determines jurisdiction (see also 2 Bom. 219, 17 Bom. 56) and section 8 of the Suits Valuation Act also lays down that "where in suits other than those referred to in Court Fees Act 1870, section 7, paragraphs v, vi and ix and paragraph x, clause (*d*), Court fees are payable *ad valorem* under the Court Fees Act, 1870, the value determinable for the computation of Court fees and value for purposes of jurisdiction shall be the same."

The present suit is a suit for partition and separate possession, and so it is governed by section 7, paragraph 4, clause (*b*) of the Court Fees Act 1870.

The valuation for computing Court fees and that for purposes of jurisdiction are the same, namely, Rs. 1,944-14-0. This Court has, therefore, no jurisdiction; and the proper Court to hear the suit is the Court of the Second Class Subordinate Judge at Jalgaon.

Assuming that it is the Court's province to determine valuation for the purposes of Court fees and jurisdiction, still I think that the principle adopted by the plaintiff of valuing the fields at five times the assessment is correct. Under paragraph v, clause (*d*), proviso I of section 7 of the Court Fees Act this principle of valuation is laid down, when the claim is for the possession of the revenue paying land; and there seems no reason why a plaintiff who asks for possession after partition should be compelled to pay a higher Court fee. It has been held that for purposes of jurisdiction, the value of a suit for a declaratory decree must be taken to be what it would be if it were for the possession of the property in respect of which the declaration is prayed for. See I. L. R. 12 Mad. 223. And the same rule, I think, should apply to a suit for partition if it is considered that the plaintiff is not at liberty to value the claim according to his pleasure

The plaintiff appealed against this order.

G. K. Dandekar for the appellant:—In a suit to recover possession of property by partition, the value of the subject matter is the market value and not the value fixed for court fee purposes, and it is the market value which determines jurisdiction. See *Kalu bin Bhiwaji* v. *Vishram Mawaji*[1] and

(1) (1877) 1 Bom. 543.

Dayachand v. *Hemchand Dharamchand*.[1] Here, the market value has been found to exceed Rs. 5,000 in value.

Further, a suit like the present should be treated as a suit for possession falling under section 7, paragraph (v) and not under section 7, paragraph (iv) (*b*), of the Court Fees Act 1870. It is always easy to determine the market value of the plaintiff's share in partition suits. Paragraph (iv) of section 7 contemplates suits where it is not practicable to determine the value of the relief claimed. If I am so far right, then the suit falls under the exceptions to section 8 of the Suits Valuation Act 1887.

Conceding for argument's sake that the suit is one falling under section 7, paragraph iv, clause (*b*) of the Court Fees Act, section 8 of the Suits Valuation Act has no application inasmuch as the present suit relates to lands paying revenue to Government. Section 8 is to be read subject to sections 3 and 4 of the Act, which prescribe a special mode of valuation in cases of suits relating to lands paying revenue to Government. The effect of sections 3, 4 and 8 taken together is that in any suit relating to land whether it be for possession or from injunction or for a mere declaration, the value of the subject matter is not the value which is put for Court fee purposes but a different value which is the market value.

I submit that section 8 of the Suits Valuation Act has no application to a suit relating to land although the suit may be to obtain a declaration in respect of land or a suit for partition of land.

A. G. Desai (*amicus curiæ*) for the respondents:—I submit this suit falls under section 7, clause (iv) of the Court Fees Act 1870, as it is the part of his share which is sought for by the plaintiff and partition is ancillary to such a relief. Otherwise, the clause (iv) (*a*) would be superfluous. The claim in question expressly contemplates a claim for partition; once partition is decreed, separate possession of the share follows as a matter of course. Suits for partition have been held to fall under section 7, clause (iv) (*b*). See *Motibhai* v. *Haridas*.[2]

(1) (1880) 4 Bom. 515. (2) (1896) 22 Bom. 315.

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Once it is conceded that the suit falls under clause (iv) (*b*) of section 7 of the Court Fees Act, it is clear that under section 8 of the Suits Valuation Act, the value for the Court fee purposes and jurisdiction is the same, and section 4 of the latter Act does not modify the general principle laid down in section 8.

BATCHELOR J.:—We are obliged to Mr. A. G. Desai for his assistance in this appeal. It arises out of a suit which is described by the learned Subordinate Judge as a suit for the partition and separate possession of joint family property, consisting of lands, houses and moveables.

The question before us is as to the Court which is properly vested with jurisdiction to try this suit. That depends upon the value of the subject matter of the suit. The market value of the share claimed by the plaintiff has been ascertained to be Rs. 5,600 and that sum is not now objected to on behalf of the defendants.

The First Class Subordinate Judge has returned the plaint for presentation to the Second Class Subordinate Judge, being of opinion, that the suit falls within the jurisdiction of this latter official. Mr. Dandekar on behalf of the appellant urges that that is wrong, and that the suit properly belongs to the jurisdiction of the First Class Subordinate Judge himself.

The question really turns upon the section of the Court Fees Act which governs this particular class of suits. The Lower Court assigned it to sub-clause (*b*) of paragraph (iv) of section 7 which refers to "a suit to enforce the right to share in any property on the ground that it is joint family property." Upon the best consideration that I can give to the point, it appears to me that the suit is not properly referable to this clause. Paragraph (iv) comprises six different classes of suits, and omitting the momentarily ambiguous class under clause (*b*), it is to be observed that all the suits in the paragraph are claims for a relief which is not properly assessable in money. *Primâ facie* therefore, no suit to obtain possession of land, which has an easily ascertained market value, can logically be brought under paragraph (iv); in fact, so to treat a suit referring to land would, it seems to me, throw the whole paragraph into confusion. Next,

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clause (*b*), it should be observed, refers to a suit to enforce the right to "share" in any property, not the right to "a share" in property. The words themselves, therefore, suggest that the suit is for the enforcement of what one may call an abstract claim or right, and that would bring the clause (*b*) into proper logical neighbourhood with the other clauses of the paragraph. I am of opinion, therefore, that this suit more properly falls under paragraph (v) of section 7 as being a suit for the possession of land. This view receives some support from the provisions of the Suits Valuation Act, because if the suit is referred to paragraph 4 (*b*), it will apparently be governed by section 8 of that Act, and will, there again, be bracketed with other suits of a totally different character, suits from which it appears to have been the object of the Legislature to discriminate a suit for the possession of land. Mr. Desai has called our attention to the decision of this Bench in *Motibhai* v. *Haridas*[1], but I think that that case can be distinguished from the suit before us, for there, as I read the report, it was admitted that the value of the subject matter of the plaintiff's suit was Rs. 250 and the only point really in dispute was whether that value or the total value of the entire property to be divided should form the test for the purposes of jurisdiction. If that is so, then the observations of Mr. Justice Parsons, which seem to be in conflict with the opinion which I have above expressed, were not necessary for the decision. For the reasons stated I am of opinion that the decree of the Court below must be set aside and the suit remanded for trial to the First Class Subordinate Judge.

Costs, costs in the cause.

BEAMAN J.:—I am of the same opinion. A suit to obtain by means of partition a slice of land, the approximate value of which can easily be stated in terms of money, appears to me to be plainly a suit for the possession of land. Such a suit cannot, in my opinion, be brought within the meaning of section 7 (iv) (*b*) of the Court Fees Act (VII of 1870), which appears as clearly to be intended merely for suits to enforce what my learned brother has properly called an abstract right "to share in any joint

(1) (1896) 22 Bom. 315.

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property." That being the case and the suit being a suit for possession of land, most of the difficulties which would otherwise have beset our decision disappear. And I have no reason to doubt, notwithstanding some apparent conflict in what was described as *obiter dicta* in at least one previous case, that once this point has been raised and all that has been implied in it definitely stated, the decision which we have come to is the right decision and correctly interpretes the statute.

Decree set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909. *July* 12.

NARAYAN RAVJI RANADE (ORIGINAL PLAINTIFF), APPLICANT, *v.* GANGARAM RATANCHAND MARWADI AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

Small cause suit—Suit brought in the Court of First Class Subordinate Judge having small cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge who had no small cause powers—Registering the suit as a regular suit—Trial of the suit by the First Class Subordinate Judge as a regular suit—Suit remains a small cause—Appeal—Jurisdiction.

A suit of the nature of a small cause was instituted in the Court of the First Class Subordinate Judge who had small cause powers. At the date of its institution, he was on privilege leave and his Court was in the charge of the Joint Second Class Subordinate Judge who had no small cause powers. The suit was therefore registered as a regular suit. On his return from leave the First Class Subordinate Judge tried it as a regular suit. The question having arisen whether the suit was a small cause

Held, that the First Class Subordinate Judge continued to be a Judge with small cause Court powers during his absence on leave, and the entering of the suit in the file of regular suits could not take it away from the category of small causes nor could the fact that the Subordinate Judge tried the suit under his ordinary jurisdiction deprive it of its character as a small cause.

APPLICATION under extraordinary jurisdiction under section 115 of the Civil Procedure Code (Act V of 1908).

The plaintiff filed a suit to recover Rs. 287 on a promissory note from the defendants. The suit was instituted in the Court

* Civil Application No. 67 of 1909.

of the First Class Subordinate Judge of Nasik (Mr. G. L. Nanavati) who had small cause Court powers. He was on privilege leave when the suit was lodged, and the charge of the Court was with the Joint Second Class Subordinate Judge who had no small cause Court powers. The suit was therefore registered as a regular suit. On his return from leave, the First Class Subordinate Judge tried it as a regular suit; and decreed the plaintiff's claim with costs.

The defendants appealed to the District Judge of Nasik (Mr. B. C. Kennedy) who reversed the decree and dismissed the suit.

The plaintiff applied to the High Court.

D. R. Patwardhan for the applicant:—We submit that the nature of a suit is not changed by the manner in which it is tried. Here the suit was filed in the Court of the Judge who had small cause Court powers; but as he was away on leave on the day it was filed, the Second Class Subordinate Judge who held charge of his Court had it registered as a regular suit, for he had no small cause Court powers. The suit was, as a matter of fact, tried by the Judge who had the powers, but as a regular suit. Still, the nature of the suit cannot be changed by the procedure adopted. See *Pitamber Vajirshet* v. *Dhondu Navlapa*[1].

P. D. Bhide for the opponent:—The case referred to does not apply: first, because though the suit was there filed properly it was tried as a regular suit; and secondly, it was decided under the old Act which differed in this respect from the present Act. The small cause powers must exist at the very inception in the Judge who takes cognizance of a case. See *Venkatrao* v. *Mahableshwar*[2]; *Hari Kamayya* v. *Hari Venkayya*[3]; *Soundaram Ayyar* v. *Sennia Naickan*[4]; *Kannan Nambiar* v. *Anantan Nambiar*[5]; *Akshay Kumar Shaha* v. *Hira Ram Dosad*[6].

(1) (1887) 12 Bom. 486.
(2) (1901) 26 Bom. 241.
(3) (1903) 26 Mad. 212.
(4) (1900) 23 Mad. 547, at p. 563.
(5) (1905) 29 Mad. 124.
(6) (1908) 35 Cal. 677.

1909.

NARAYAN RAVJI v. GANGARAM RATANCHAND.

Further, the point of jurisdiction, not having been raised in the District Judge's Court, cannot be raised here. See *Kulada Kinkar Roy* v. *Danesh Mir*[1]; *Sri Raja Simhadri Appa Rao* v. *Chelasane Bhadrayya*[2]; *Parameshwaran Nambudiri* v. *Vishnu Embrandri*[3]; *Suresh Chunder Maitra* v. *Kristo Rangini Dasi*[4]; *Ram Lal* v. *Kabul Singh*[5] and *Muthusami Mudaliar* v. *Nallakulantha Mudaliar*[6].

CHANDAVARKAR, J.:—It is admitted, and indeed the record shows, that the suit was instituted in the Court of the First Class Subordinate Judge and that at the time of institution the Subordinate Judge had conferred on him the powers of a Small Cause Judge. The present suit was of the nature of a small cause and fell within that jurisdiction. But it is argued that the suit is not a small cause because it was not tried as such. It is true it was tried by the Subordinate Judge, First Class, not under his small cause but under his ordinary jurisdiction. The reason is that at the time of its institution, the Subordinate Judge, First Class, having gone on privilege leave for twenty-one days, the Joint Subordinate Judge, Second Class, who was in charge of the Court, had the suit registered in the file of regular suits and not in the file of small causes. But, on that account, the Subordinate Judge, First Class, had not ceased to be a Judge of the Court with small cause powers; his absence was merely temporary; he had gone on privilege leave and no *locum tenens* had been appointed. Hence no re-investment of his powers as a Small Cause Judge became necessary when he resumed charge of his office. He continued to be a Judge with those powers during his absence and the entering of the suit in the file of regular suits could not take it away from the category of small causes. Nor could the fact that subsequently the Subordinate Judge, First Class, tried the suit under his ordinary jurisdiction deprive it of its character as a small cause: *Pitamber Vajirshet* v. *Dhondu Navlapa*[7]. Against his decree no appeal lay to the District Court and that Court's appellate decree was passed

(1) (1905) 33 Cal. 33.
(2) (1906) 30 Mad. 41.
(3) (1904) 27 Mad. 478.
(4) (1893) 21 Cal. 249.
(5) (1902) 25 All. 135.
(6) (1894) 18 Mad. 418.
(7) (1887) 12 Bom. 486.

without jurisdiction. It is true no objection on the ground of want of jurisdiction was raised before the District Court but the petitioner before us is not precluded from urging that ground. Consent cannot give jurisdiction where the law does not confer it on a Court. The result is that the rule must be made absolute and the Subordinate Judge's decree restored but without costs here and in the District Court, as the petitioner allowed the appeal to be heard without objection.

Rule made absolute.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

In re MADHAVJI, KAMDAR AND CHHOTUBHAI AND DADA MAHOMED AND OTHERS. 1903. *December* 11.

Petition—Taxing Master—High Court Rules, Rule 544—Solicitors' retainer denied—Taxation of costs.*

An attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill.

In re Jones(1) followed.

The facts of this case appear sufficiently in the Judgment.

Raikes, for the applicants.

Our application is made under the amended rule 541 of the High Court Rules, the latter part of which is in point. Our application is merely for an order to tax our bills and the order asked for, when made, will not affect the question of liability of the clients. When the bills are taxed and the amount of costs ascertained we shall have to proceed under Rule 866 of the High Court Rules and take out a summons against the clients and at the hearing of such summons the clients will have an opportunity to be heard on the question of their liability. They have no

* High Court Rules (2nd Edition), Rule 544 runs as follows:—

"544. The Taxing Officer shall tax the bills of costs on every side of the Court (except the appellate side) and in the Insolvent Court. All other bills of costs of attorneys shall also be taxed by him when he is directed to do so by a Judge's order."

(1) (1887) 36 Ch. D. 105.

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right to oppose this application and the order asked for should be made as of course. See *In re Jones*(1), *Re Flower*(2) and notes on the subject in Volume II, Annual Practice 1909.

Strangman, for the opponents.

RUSSELL, J.:—This was a petition *in re* certain costs of Madhavji & Co.

Messrs. Madhavji, Kamdar and Chhotubhai presented a petition for an order that the Taxing Master do tax bills of costs of petitioners with reference to the matters referred to in the petition.

The opponents *inter alia* deny their retainer of the petitioners.

The petition is presented under the new Rule 544 which was passed to give effect to the decision of Davar, J., in *Bai Dossibai* v. *Crawford, Brown & Co.*(3). The rule runs as follows:—

"544. The Taxing Officer shall tax the bills of costs on every side of the Court (except the appellate side) and in the Insolvent Court. All other bills of costs of attorneys shall also be taxed by him when he is directed to do so by a Judge's order."

It will be observed that this rule is imperative, and it has been held that an attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill: *In re Jones*(1).

Where the retainer is disputed, it appears clear that payment of the amount due to the attorney can be enforced by an action only: see Solicitors' Act. 1843, s. 43, and *In re Debenham & Walker*,(4) and *Re Harcourt*(5).

Now it is obvious that before an attorney files his suit, it is essential that the amount he claims be ascertained, and it appears to me desirable both from the point of view of the attorney and the client that that should be done. Until taxation, the sum certain cannot be known.

Again it is competent for the client to dispute the retainer before the Taxing Master with reference to each and every item

(1) (1887) 33 Ch. D. 105.
(2) (1882) 19 W. R. 578.
(3) (1908) 32 Bom. 428.
(4) [1895] 2 Ch. 430.
(5) (1887) 32 Sol. J. 92.

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of the bill: *In re Jones*[1]. Assuming that the clients do so in this case, it may be they will be satisfied with the result of the taxation, in which case it is possible that a suit by the attorney will not be necessary.

I, therefore, make an order in the terms of the prayer of the petition. But it is to be hoped that the Taxing Master will scrutinize with great care the correspondence that has been produced before me in this matter, the greater bulk of which, in my opinion, is wholly unnecessary.

The costs of this application are reserved and will abide the result of the taxation or the subsequent suit.

Attorneys for the applicants: Messrs. *Madhavji, Kamdar and Chhotubhai.*

Attorneys for opponents: Messrs. *Dinsha and Dharamsey.*

B. N. L.

(1) (1887) 36 Ch. D. 105.

APPELLATE CIVIL.

Before the Honourable Mr. Justice Chandavarkar, Acting Chief Justice, and Mr. Justice Heaton.

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June 15.

KALGAVDA TAVANAPPA PATIL (ORIGINAL DEFENDANT 1), APPELLANT, *v.* SOMAPPA TAMANGAVDA PATIL AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Adoption—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth.

When a married Hindu having a son, is given in adoption, the son does not like his father lose the *gotra* and rights of inheritance in the family of his birth and does not acquire the *gotra* and a right of succession to the property of the family into which his father is adopted.

In the absence of any special custom, Jains are governed by the ordinary Hindu law.

FIRST appeal against the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum, in original Suit No. 379 of 1906.

Suit to recover possession of vatan property.

The property in suit belonged to one Annappagavda. He had a son Tavnappa, defendant 2, and two step-brothers, Somappa-

* First Appeal No. 41 of 1908.

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gavda and Devendragavda, plaintiffs 1 and 2. Tavnappa had a son Kalgavda, defendant 1. Annappa gave his son Tavnappa in adoption to one Anaya after the birth of Kalgavda, defendant 1. Annappa died in the year 1904 after making a will, whereby he bequeathed all his property to his grandson Kalgavda. In the year 1906 Annappa's two step-brothers, plaintiffs 1 and 2, brought the present suit against defendants 1 and 2 to recover possession of the property in suit, alleging that as defendant 1 was already born at the time of the adoption of his father, defendant 2, he went along with his father into the adoptive family and the defendants had no right to Annappa's property to which the plaintiffs were entitled to succeed as Annappa's heirs. They further urged that Annappa had no authority to will away his property in favour of defendant 1.

Defendant 1 contended *inter alia* that though his father was given in adoption, still as he was born before the adoption, his rights in the family of his birth were not affected by his father's adoption and that he was the heir to deceased Annappa's estate. He also set up his right to the property under Annappa's will.

Defendant 2 did not file a written statement.

The Subordinate Judge found that the plaintiffs were entitled to succeed to the estate of Annappa in preference to the defendants and that defendant 1 was not entitled to succeed on the strength of the alleged will in his favour and he had no right of inheritance in the family of his birth. The plaintiff's claim was therefore allowed for the following reasons:—

With the exception of a single case noted at page 1148 of West and Buhler's Hindu Law, there is no direct authority on the point. Neither has the case been provided for by any of the text-writers. The analogy of the Roman Law on the point may be taken for a guide under such circumstances. According to that law, a son born before adoption of the father, passes with the father into the adoptive family (Justinian's Institutes, pages 46 and 47).

It is admitted that by adoption of a man his wife passes with him into the adoptive family. Why then should not a son pass as well? As to this it is said that a wife by her marriage becomes the life companion of her husband and must pass with him. The relationship of father and son is equally sacred. It cannot be done away with, except when the son is given away in adoption.

I think we should accept the common sense view of the matter. The question is, whose son the boy is after adoption of his father? There can, I

think, be no two answers to this question and everybody would be bound to admit that he remains the son of the adopted man. If that is so, he must look for his birth rights in the family of adoption. The case in West and Buhler noted above appears to have been decided on this principle.

It is, however, contended for defendants that the son of the man given in adoption might remain his son but that no body can divest him of the interest which he has acquired by birth in the natural family. That argument is a weighty one and must be carefully considered. I attempt to consider it below.

A grandson acquires by birth a vested interest in the ancestral property. That is true enough. But that interest is not one fixed once for all, but is liable to be varied or done away with altogether. Suppose there is a family consisting of a man, his son and grandson. The property is ancestral of the man. The interest of the grandson extends to a fourth share in the property and it was acquired by him as soon as he was born. But subsequently to his birth other sons are born to the man or to his son or both, the interest of the first son is diminished thereby. He cannot be allowed to say that since he was at his birth entitled to a fourth share that share must be allotted to him notwithstanding births of other sons. This is an instance of diminution of the vested interest. Under a different state of facts the vested interest would be increased. These are of course cases in which neither the man himself nor his son have any control.

But the man or his son may for proper necessary purposes alienate the property and in that case the vested interest of the son is altogether destroyed. Likewise the vested interest of the grandson is done away with if he is given away in adoption by his father.

Thus it will appear that the vested interest of the grandson is liable to decrease or increase or to be done away with altogether. If his father can do away with the vested interest of the grandson by giving him away in adoption why should he not have the power of destroying that interest by severing all connection with the natural family by himself being given into adoption in another family? All these considerations lead me to conclude that the grandson passes by adoption of his father into another family and cannot succeed as an heir in the natural family in preference to other nearer heirs. Hence I hold that defendant 1 in this case cannot succeed in preference to plaintiffs.

Defendant 1 appealed.

M. B. Chaubal (Government Pleader) and *C. A. Rele* appeared for the appellant (defendant 1) :—In spite of our father's adoption into another family we retained our right and status in the family of our birth. The parties are Jains and they do not perform *shráddhas* (annual obsequial ceremonies). Amongst them adoption is not made for spiritual purposes. It is made for secular purposes only. The theories of Hindu law based on

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spiritual notions and *shráddha* do not affect them: Mayne's Hindu Law, page 168, 7th Ed.; West and Buhler, p. 1148, 3rd Ed.

The Subordinate Judge has attempted to romanize the Hindu Law and has wrongly decided the case against us on the analogy of Roman Law. The case ought to have been decided according to the recognized principles of Hindu Law.

Secondly, the Subordinate Judge has held that a son born before his father's adoption goes with his father into the adoptive family in the same way as the wife goes with her husband when he is adopted. This is a wrong view. The case of a wife is different from that of a son. The wife takes through her husband while the son acquires a right by birth and takes along with the father. Besides according to the texts a wife is part and parcel of her husband.

The third ground on which the case is decided against us is that although a Hindu acquires an interest by birth, that interest is not a fixed one and is liable to be varied. But his interest as joint owner does not cease. Circumstances may increase or diminish the *quantum* of that interest. This interest acquired by birth can be taken away only in particular cases and under particular circumstances. It is a right created by a text and it can only be taken away by a text. The adopted person loses his right on account of a text: Mandlik's Translation of the Vyavahar Mayukh, p. 59. The text applies only to the person adopted. There is no text which takes away the right of a grandson, that is, a son born before adoption.

The effect of adoption is personal. It only passes the person given in adoption into the adoptive family. The forms of the ceremony of adoption do not speak of a vicarious effect on the son of the person adopted. Adoption is the civil death of a person in the family of his birth and is his re-birth in the adoptive family: Sarkar's Hindu Law, p. 150, 3rd Ed.

The opinion of the Shastri given at p. 1148 of West and Buhler should not be accepted. It is neither supported by any reason nor by any text. Even if the son's son passes out, he will not lose his interest in the family of birth. It is vested and indefeasible interest. He does not cease to be a grandson

because his father has ceased to be a son. The capacity of the adopted person's son to inherit in the family into which his father is adopted, even if allowed, will not destroy his capacity to inherit in the family of his birth, since such capacity is based on blood relationship and the rights by birth remain in tact in spite of the father's adoption.

The will made by our grandfather and the other evidence in the case show that the intention of both, the grandfather and father, was that we should remain in the natural family.

Jayakar with *S. S. Patkar* appeared for the respondents (plaintiffs) :—According to Hindu law the son of a person given in adoption passes with his father in the adoptive family by implication. There is no direct authority on the point either in the Text Books or British Indian Works, except one case in West and Buhler, p. 1148, which supports our contention. We submit that the rules laying the age-limit of the son to be adopted are of later growth and that the practice of giving away sons, having sons, in adoption, must have been rare : Dattak Chandrika II, 33; Sarkar's Hindu Law, p. 152, 3rd Ed.; Sarkar on Adoption, p. 359, 3rd Ed.; *Sree Brijbhookunjee Muharaj* v. *Sree Gokoolootsaojee Muharaj*[1], *Nathaji Krishnaji* v. *Hari Jagoji*[2]. The original texts which we rely on will have to be interpreted on this footing.

In the absence of direct authority except as aforesaid, the question will have to be determined with reference to, *first*, the principles and analogies known to Hindu law, and, *secondly*, the broad equities of the case. That the parties are Jains is immaterial for no contrary custom is pleaded in this case and the general Hindu law will, therefore, apply : Mayne's Hindu law, p. 134, 7th Ed. : *Bhagwan Koer* v. *Bose* [3]; *Sundarji Damji* v. *Dahibai* [4]; *Manohar Lal* v. *Banarsi Das* [5]; *Amava* v. *Mahadgauda* [6].

I. If we consider the question by the principles and analogies known to Hindu law, we find,—

(1) (1816) 1 Borr. 202 at p. 216.
(2) (1871) 8 Bom. H. C. R., A. C. J., 67 at p. 72.
(3) (1903) 31 Cal. 11.
(4) (1904) 29 Bom 316.
(5) (1907) 29 All. 495.
(6) (1896) 22 Bom. 416 at p. 422.

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(*a*) That the father, wife and son constitute a unity of Hindu family, the main idea being that the wife is the other half of the husband, and the son is the soul of the father re-incarnated. The wife and the son are both the body of the father as it were; so complete is their identification: Manu IV, 184; Mandlik's Manava Dharmshastra, p. 554; Bapu Shastri Moghe's Mitakshara, p. 15, 3rd Ed., interpretation of the term *jáyá* (wife). This identification is more complete in the case of the son than the wife: *Gangu* v. *Chandrabhagabai*[1]. If therefore the wife passes with the husband, as is conceded, *a fortiori* should the son pass with the father on the adoption of the latter. The grandfather has nowhere been given the power of sending his son out of his line by adoption so as to encroach on this essential unity of the father, mother and son in Hindu law.

(*b*) There is also another feature of similarity between a wife and son in Hindu law, *viz.*, that the father enjoys a *patria potestas* or qualified ownership over them both: Bapu Shastri Moghe's Mitakshara, p. 225, 3rd Ed.; Yajnyavalkya Smriti II, 175 and following. If the father, therefore, is given away in adoption by the grandfather, he must pass out along with those who are recognized by Hindu law, for the purposes of developing and perfecting the domestic life, to be within the pale of the father's influence and *patria potestas* and to whose society and up-bringing he is entitled according to law. The grandfather, by the act of giving away his son, cannot deprive him of the objects over which the son enjoys such ownership. To allow the grandfather the double power (1) of tearing his son out of his natural environment, and (2) of depriving him of the right of taking his wife and sons with him, would be against the conception of Hindu law and an unjustifiable widening of the texts allowing the gift of a son in adoption, to say nothing about such a power being harsh and inequitable.

There is a passage in the Vyavahar Mayukh, hapter IV, section 1, pl. 11, which at first sight seems to be against our contention but if rightly construed it is in our favour,

(1) (1907) 32 Bom. 275.

for t only denies that the father has over his wife and son the same kind of physical ownership as over his cow. The passage, however, admits that the father does enjoy a qualified or secondary (*gauna*) ownership over them. Medhatithi supports the same view: Manava Dharmshastra, Vol. I, p. 296. Instances of qualified ownership over the son are also to be found in the rule of Hindu law that father's dominion over the son extends to the power of giving away the son in adoption: Vyavahar Mayukh, IV, pl. 15; West and Buhler, 1146, 3rd Ed.; Sarkar's Hindu Law, pp. 117, 119, 3rd Ed. If therefore the father can transfer the son into another family by his voluntary act of giving away, there is nothing opposed to Hindu notions in holding that such a transfer takes place by implication in Hindu law by the father himself going out of his family under the gift in adoption made by the grandfather.

(*c*) The texts declaring the effect which adoption has on the severance of connection between parties are also in our favour. Adoption cuts away the *gotra* (line), *riktha* (inheritance) and *pinda* (funeral oblations) of the son and the father: Manu IX, 242; *Rachava* v. *Kalingapa* [1].

Adoption, therefore, has the effect not merely of destroying the individual relationship of the father giving and the son given; its effects extend to a disconnection of the lines of the father and son, meaning thereby that the son given away and his own issue become disconnected from the father and his relations in the ascending and the descending line.

This view is confirmed by the interpretation put on the above text of Manu (IX, 242) by the Vyavahar Mayukha, Chapter IV, section 5, pl. 22, where the author after pointing out that words *gotra, riktha* and *pinda* have to be understood in a wide and liberal sense as inclusive of all acts, connected therewith, proceeds to state that adoption brings about the extinction of all such acts, and by way of illustration mentions that "from this also follows, as a matter of course, the cessation of family connection with the uterine brother and the father's brother and

(1) (1892) 16 Bom. 716 at p. 719.

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the rest." The author thereby illustrates the principle that the disconnecting effects of adoption are extended beyond the two individuals concerned.

The Vyavahar Mayukha, Chapter IV, section 5, pl. 37, 38 develops the same idea. The giver and taker of the boy both intend, by the adoption, to affect not only the single relationship of father and son, but the various other relations dependent on that relationship: Dattak Mimansa, VI, 8; Dattak Chandrika, II, 18 and 19. Sarkar's view (Sarkar's Hindu Law, pp. 156, 158, 3rd Ed.) that adoption is only a civil death of the person given, is not quite accurate and has not been accepted to be so: *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* (1).

It thus follows that the two lines having been disconnected as aforesaid by the adoption and the son being identified with the father and being also under his dominion, on the father passing out by adoption, the son also goes out with him.

(*d*) The relationship between the father and the son is sacred and inviolable in Hindu law; nothing can destroy it, not even the grandfather's act of giving away the father in adoption. The son, as the offspring of his father, has the *duty*, and the father, as his progenitor, the *right* of giving and receiving *shraddhas* and other obsequial rights. This nexus is indissoluble and even in cases where it is replaced by another tie based on legal fictions, as for example, the son by adoption becoming the son of the adoptive father, or the damsel's son (*kánin*) becoming in certain cases the son of his mother's father, the same is allowed as an exception in consequence of special texts: Mitakshara, I, pl. 7. Even in such exceptional cases, if by some chance the artificial tie happens to snap, the natural relationship revives and the son comes back to his genetive father as an heir or sharer: Manu, IX, 162,181 and Medhatithi's comments thereon at pp. 1189, 1198 and 1207 of Manava Dharmshastra, Vol. II.

It was argued that the single ceremony of adoption can only affect the son who is the object of the ceremony, it cannot affect

(1) (1905) 29 Mad. 437 at p. 438.

the son's son. To this our answer is twofold—(1) The son's son passes not in consequence of any vicarious effect of the said ceremonies, but by implication of Hindu law, and (2) even the doctrine of ceremonial identification between the father and son, in the sense that ceremonies performed by the one or on the one have their effect on the other, is not unknown to Hindu law: Manu II, 27, 37; Manav Dharmshastra, Vol. I, pp. 119, 129, 130; Yajnyavalkya I, 56; Bapu Shastri Moghe's Mitakshara, p. 15.

It was further argued that the son takes by birth a vested and indefeasible interest in his paternal property which would be defeated if our contention be allowed. But adoption is an exception to this rule assuming the so-called rule is as binding and definite as alleged; as for example, if a son gives his own son in adoption can the grandfather raise this doctrine as a bar? In Hindu law the grandson's relationship to the grandfather is through the father as the word *pautra* (son's son) itself indicates. If, therefore, the sonship ceases, *ipso facto*, the grandsonship must come to an end. Besides adoption wipes out all relationship traceable through the father, like that of uncle, brother and the rest: Vyavahar Mayukh, IV, pl. 23. The grandfather being the father's father must cease to be so the moment the father ceases to be his son. All vested rights of property being based on this relationship, as was conceded, will also end: Mitakshara, I, pl. 2; *Gangu* v. *Chandrabhagabai* [1]; *Ananta Balacharya* v. *Damodhar Makund* [2]; *Kandasami* v. *Doraisami Ayyar* [3]; *Baldeo Das* v. *Sham Lal* [4], Colebrooke's Digest, Vol. II, p. 562. The doctrine of the grandson's taking a vested interest by birth is qualified by another doctrine of Hindu law that the said vested interest works itself out through the father, as for example, for purposes of partition. The rule of Hindu law that on the father becoming disqualified, the disqualification of the son would necessarily follow unless saved by special texts, also illustrates the principle that the son's interest, though vested by birth, is traceable and works out through the father: Mitakshara, II, pl. 9; *prapta* in the sense of "necessarily implied."

(1) (1907) 32 Bom. 275.
(2) (1888) 13 Bom. 25.
(3) (1880) 2 Mad. 317.
(4) (1875) 1 All. 77.

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If we test the question by applying the theory of *shraddhas*, the texts prescribing the *shraddhas* which the son of the adopted son has to perform support our contention: Vyavahar Mayukha, IV, pl. 23; Dattak Chandrika, III, 20, 21. The opposite contention, if allowed, will lead to a double anomally, *first*, the son's son remaining in the old family would have no father for whom to perform the *shraddhas* and *second*, the grandfather in the old family would have no *shraddha* after his death, except for a year during which his grandson would perform it, but at the end of that period his grandson could offer the *shraddha* to him only as *párvan* rite through his own father which is impossible *ex hypothesi*.

II. Even the broad equities of the case are in our favour for holding that the son should pass out with his father on the latter's adoption. The main tests will be—(1) What is for the welfare of the son, and (2) What would be fair and equitable from the stand point of the father going out by adoption.

(1) It is obvious that the son's welfare would be better promoted by allowing him to go out with his father for the following reasons:—(*a*) Pecuniarily his position would certainly be better, for gnerally it is only the poor or the comparatively poor who give their sons in adoption into a richer family, (*b*) his genetive father and mother would certainly take better care of him than the decrepit old grandfather, or the rival co-parcener uncles in the family of his birth and (*c*) if he is a minor of tender age who would be his guardian? Unless our contention is allowed, his genetive mother and father would not be his guardians, for having gone out of the family by adoption, they would be strangers.

(2) It is unfair that the grandfather should have the power of sending the father out of the family without allowing him to take with him his sons to whose company and up-bringing he has an indefeasible right. Why is his wife allowed to go with him? In order that there may be no void in his domestic existence in his new environment, a doctrine expressed in Hindu spiritual conception of the identity of the husband and wife. Is there not a similar, if not a greater, identity

with his sons, who in the strict conception of Hindu law, are his own soul re-born and his saviours in the next world by reason of the *shraddhas* they would offer him? Why should the grandfather's act of giving him away in adoption, over which in strict theory, he has no control, be allowed to deprive him of the society of his children, any more than his wife. There is no authority for the proposition that a father cannot give his adult son in adoption except with the consent of such son.

Chaubal in reply :—The motive for adoption among the Jains being purely secular, the argument based upon the theory of performing *shraddhas* and offering of *pindas* can have no application. The cases relied on are cases of succession and special custom.

The term *gotra* as used in the texts cannot mean anything else than family.

CHANDAVARKAR, Ag. C. J. :—This appeal raises an important question of Hindu law, which may be stated as follows :—When a married Hindu, having a son, is given in adoption by his natural father, does the Hindu's son also, like his father, lose the *gotra* and rights of inheritance in the family of his birth and acquire the *gotra* and a right of succession to the property of the family, into which the Hindu is adopted ?

The parties to this first appeal are Jains, but, in the absence of any special custom, Jains are governed by the ordinary Hindu law : *Bhagvandas Tejmal* v. *Rajmal* [1] ; *Sheo Singh Rai* v. *Mussumut Dakho*.[2]

No special custom, departing from the ordinary Hindu law of adoption, has been set up in the present case, and the question above stated must be determined with reference to that law.

The Subordinate Judge (Mr. V. V. Phadke), who tried the suit out of which this appeal arises, has decided the question in the affirmative, mainly on the strength of a *vyavastha* (rule) quoted as from a manuscript at page 1148 of West and Buhler's Digest of the Hindu law, 3rd Ed., and on the analogy of the Roman law. The *vyavastha* apparently represents the view of a shastri,

(1) (1873) 10 Bom. H. C. R. 241.

(2) (1878) L. R. 5 I. A. 87 at p. 108.

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and is one of the opinions collected on different points of Hindu law by the learned authors of the Digest. The *vyavistha* is as follows :—

"A man having a son is adopted and then dies. His son takes his place as heir in the adoptive family."

"This is so, though another son is born (to the adopted) after the adoption."

"The son born before his father's adoption not only is heir to the adoptive grandfather's estate, but is answerable for a debt of the grandfather admitted by his father."

No reason is given, no text cited in support of this opinion. We cannot, therefore, accept it, unless a close and careful consideration of the principles of Hindu law, bearing on the question under consideration, satisfies us that it is correct.

The Subordinate Judge has also adopted for a basis of his decision "the analogy of the Roman law on the point" as "a guide under such circumstances", as if the Hindu law were barren of light on the subject. That law is a jurisprudence by itself and contains within its limits all the principles necessary for application to any given case. It is doing scant justice to Hindu law as a science to suppose that, because there is no express text providing for a concrete point arising for adjudication, therefore there is nothing in it to guide a Judge in deciding that point and he must import analogies from foreign laws to help him. The Hindu law-givers have not indeed laid down a rule in express terms on every conceivable point. But having provided texts for such cases as had arisen before or in their time, they left others to be determined either with reference to certain general principles laid down by them in clear terms or by the analogy of similar cases governed by express texts. Had the Subordinate Judge (a Hindu) gone into the question in this case a little deeper and considered the authorities on Hindu law a little more carefully than he seems to have done, he would have found that there was no need of romanising the Hindu law for the purposes of his decision.

In determining the question before us, we must bear in mind the exact position which the son, born to an adopted Hindu before the adoption, occupied at that time. By birth he acquired the *gotra* or

family of his birth; and, if that family was joint and owned ancestral property (as was the case with the parties before us), he acquired by the very fact of birth, joint ownership over that property with his father. "Grandsons," says the Mitakshara, (Ch. I, Sec. V, pl. 2), "have by birth a right in the grandfather's estate equally with sons." "The grandson has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from the grandfather," (pl. 9). It is true that this right of ownership by birth, which grandsons acquire, is subject to the qualification that at partition "the distribution of the grandfather's property must be adjusted through their fathers, and not with reference to themselves," (pl. 2); but that qualification merely fixes the measure of their share. It does not destroy the vested right of equal ownership with the father, which exists all the same in the grandsons. As explained in the *Viramitrodaya*:—"Thus the competency being equal, and the right by birth also being equal, equal participation would have followed but is prevented by the text: 'Among grandsons by different fathers, the allotment of shares is according to the fathers'" (*Vir. Mit.*, Mr. Golapchandra Sarcar's Translation, p. 90).

The Subordinate Judge admits all this in his judgment, but he gets over it by observing that the interest acquired by a grandson "is not fixed once for all but is liable to be varied or done away with altogether," because his share may be increased or decreased according as his father or grandfather has more or less sons and because the father has power to alienate the property. This is a fanciful mode of explaining away the grandson's interest acquired by birth. A man's interest in property as joint owner does not cease because circumstances may increase or diminish the quantum of that interest. As for alienation, it is allowed only in special cases. But that does not affect the question of the grandson's vested right. To quote the *Viramitrodaya* again:—"It has been established that in the grandfather's property the grandsons also acquire ownership by birth; hence the equality of the grandson's share (with a son's share) in the grandfather's property is based upon the authority of the texts and not founded upon any equitable principle." (Page 91.)

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The son, then, begotten by an adopted Hindu before adoption, has vested rights in the ancestral property of the family of his birth. Rights of property once vested cannot be taken away except in the mode or modes prescribed by Hindu law. They cease either by death, sale, gift, degradation, disqualification or by adoption. In the case of a son, whose father has been given in adoption after his birth, if none of these modes for the extinction of his vested rights of property applies, there must be the clear authority of some text for holding that the rights in question are extinguished because the father of the owner of those rights, having been given in adoption, has his rights in his natural family extinguished by the act of adoption.

So also as to the *gotra*. That is determined by birth and it adheres to a Hindu male throughout, unless it is changed by *his* adoption into another family.

It is urged by Mr. Jayakar, who has argued the case for the respondent with his usual ability and learning, that clear authority for the extinction of the rights and *gotra* is to be found, first of all, in the text of Manu which says :—

"A given son shall never claim the family and estate of his natural father ; the *pinda* (the obsequial oblation) which follows the family and heritage, and the *shraddha* and other funeral ceremonies of the giver cease." (Manu Ch. IX, Verse 242: see Mandlik's Hindu Law, p. 59, lines 10 to 13.)

The original word for "family" in this text of Manu is *gotra*. Mr. Jayakar argues that *gotra* means *santâna*, literally, continuation, as observed by Telang, J., in *Rachava* v. *Kalingapa* [1]; or *santati*, literally, a line of descendants, as explained in the *Dattaka Mimansa* (p. 25, Shiromani's Edition), and the *Samskára Kaustubha*.

These words are not always used of *descendants* only. They are often used as meaning "family," the whole group of ascendants and descendants. Medhatithi says that, according to some, *gotra* means *vamsha*, which applies both to the line of ascendants and of descendants. The author of the *Samskara Kaustubha* cites a *smriti* of Trikandi, which says, that *santati*, *gotra*, *janana* and *kula* are synonymous terms. *Kula* means, literally, family.

[1] (1892) 16 Bom. 716.

For the purposes of his argument, to make it logical, Mr. Jayakar must contend that the word *gotra* is used in Manu's text as applying only to the descendants of the man giving his son in adoption. The argument is that when the son is given, his son too ceases to belong to the family of his birth ; and that because Manu's text says that the man given in adoption is cut off by the adoption from the *gotra*, meaning, the descending line of the giver. If that is the meaning of the word, what becomes of the adopted man's connection with the ascending line of his natural father? Does that continue? Mr. Jayakar is forced to admit it does not.

Vijnaneshvara in the Mitakshara gives us the meaning of *gotra* (Mit. Sec. V, pl. 6) on the authority of Vrihat Manu. "It reaches as far as the memory of birth and name extends." If *gotra* means both the ascending and the descending line of the natural father of the man given in adoption, the latter, according to Manu's text, ceases, after adoption, to have connection with both the lines. That includes his own sons born before the adoption.

The text of Manu, which we are now discussing, in terms relates to the personal *status* of the man given in adoption. It predicates certain things of him, and him only, as the result of adoption. They are the extinction in his case of the *gotra* (family) of his natural father and the right of succession to his property. And according to Hindu logicians (*Naiyayikas*), where in a text certain qualities are predicated of a person, they apply to him only and the rule in the text should not be extended to others.(1) Manu's text, therefore, must be confined in its application to the person of whom it speaks, that is, the man given in adoption, and not extended to his son born before the adoption.

But Mr. Jayakar contends that the explanation of the text given by Nilakantha in the *Vyavhara Mayukha* brings that son within its operation. That explanation is as follows:—

"Therefore the son begotten by the *simple* adopted son should likewise perform his father's *sapindikarana*, *parvana*, *shraddha*, and the like cere-

(1) The rule is— उद्देश्य विधेय भावस्थले उद्देशावच्छेदकव्यापकत्वम् विधेये भासते ।

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monies in conjunction even with the (original) adopter." (Mandlik's Hindu Law, p. 59, lines 32 to 35.)

"The son begotten by the *simple* adopted son" means, according to Mr. Jayakar, a son begotten whether before or after adoption. But the original words used for that expression do not support that construction. The words are *kevala dattaka janyah putrah*, that is, a son begotten by the *simple adopted son*. The begetter is specified as one endowed with a particular status—that of adoption. The special reference to the *status* shows that the son begotten by such a person is one begotten after that person has acquired the *status*. That is the natural and grammatical construction of the words. Take, for instance, the word *vibhaktaja* (a son begotten by a separated co-parcener), used in a *smriti* quoted in the Mitakshara (Ch. I, Sec. VI, pl. 4). It means, "one begotten after partition." So also the word *patitastajjah* used in the text relating to exclusion from inheritance. It means "the offspring of an outcaste" that is, as explained by all the commentators, not one begotten by the person outcasted before excommunication, but one begotten while the begetter was under that disability. Similarly, "a son begotten by a simple adopted son" must mean one begotten after, not before, adoption.

The declarations, which have to be made at the ceremony of adoption by the person giving and the person taking respectively, are relied upon by Mr. Jayakar as supportiong his case. The declaration made by the natural father of the boy is as follows:—

"I am going to give my son in adoption in order to create (between my son and his adopter) those various reciprocal obligations which arise from the various relations, such as that of father and son (at present) existing between me and the like on the one hand, and this (my) son on the other." (Mandlik's Hindu Law, p. 64, lines 6 to 10.)

This declaration refers to extinction of the "reciprocal relations" which exist at the time of the adoption ceremony between the boy and his natural father. They do not in terms refer to the reciprocal relations existing then between that father and his grandson, that is, a son begotten already by the son who is being given in adoption. A grandson stands in the place of a son to his grandfather; there are reciprocal relations between them just

as there are between the father and the grandfather. They arise no doubt through the father, but nevertheless they become, after they have arisen, independent of the relations between the father and the grandfather. And there is nothing in the language of the declaration above cited to show that these reciprocal relations between the grandfather and the grandson are affected by the gift of the father in adoption.

But Mr. Jayakar maintains that the reciprocal relations of grandfather and grandson are not independent of those between the former and the father. The grandson, he argues, is related to his grandfather through the father; the father is the principal link which binds the grandson to the grandfather, and he asks, if the link is cut off, what is left to bind the grandson to his grandfather?

This ingenious argument would seem to derive some support from the doctrine of Jimuta Vahana on the subject of a grandson's right of ownership acquired by birth in his grandfather's property while the father is alive. According to him "the grandsons and the great-grandsons whose fathers are alive cannot confer oblations on the *parva* occasions; they are not, therefore, entitled to the estate of their grandfather and great-grandfather respectively. . . Their interest in the grandfather's wealth is founded on their relation by birth to their own father; consequently they have a right to just so much as should have been their father's share."

This is not, however, the doctrine of the Mitakshara school. The author of the *Viramitrodaya*, who is substantially a follower of that school, quotes the abovementioned remarks of Jimuta Vahana and combats his view. He says "that view is not acceptable" (see the Viramitrodaya, translated by Mr. Golapchandra Sarkar, pp. 90 and 91. Sec. 23a., paras 2 and 3). The reason he gives is that "in the grandfather's property the grandsons also acquire ownership by birth." That is the cardinal principle of the Mitakshara school, which divides it from the school of Jimuta Vahana. It is not correct to say that the father is the link so binding the grandson to the grandfather that, if it breaks, it carries with it the grandson too. The father is a link

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so far that through him *sapinda* relationship between grandfather and grandson is brought about. This is pointed out by Vijnaneshwara in the chapter on *Achara* (ceremonies) in the Mitakshara, while explaining the term *sapindata* as "connection by particles of one body" (see the passage cited in translation in *Lallubhai Bapubhai* v. *Mankuvarbai*) [1]. But when the relation has once been brought about by birth, the grandson becomes an entity by himself, and the continuance of that relation does not depend on the continuance of the father's relation to the grandfather. Even if the father die or become an ascetic, or outcaste, and thereby cease to have any right to the grandfather's property, the rights of the grandson, born before any of those events, do not cease but continue.

One of the obligations, which the *Shastras* impose upon every Hindu as arising from his relation to his paternal ancestors, is to beget a son and thereby discharge a debt called *pitru runa* or paternal debt due to those ancestors. This reciprocal obligation, it is urged, is extinguished when the Hindu is given in adoption by his father, and the extinction means the wiping out of the line of son, grandson, etc., represented by the son given in adoption, so far as the giver and other members of his family are concerned. The answer to that is that, when the Hindu has begotten a son before he is given in adoption, the paternal obligation has been discharged; the debt has been paid off; and that particular "reciprocal obligation" has as obligation ceased to exist. "Immediately on the birth of his first-born a man is called the father of a son and is freed from the debt to the manes." [Manu IX, 106.] The son born to the Hindu has taken the place of the debt; as grandson born in the family he has acquired certain rights; and there is no question of reciprocal obligation with reference to him between the Hindu and his father giving him in adoption. A debt discharged in the mode prescribed by the *Shastras* ceases to be a debt and with it the obligation as to it dies, so far as the father is concerned. The grandson becomes charged with a similar obligation, he becomes a continuer of the line himself [2] being both

(1) (1876) 2 Bom. 388 at p. 423.

(2) See on this point section 23A of the Virmitrodaya, p. 90 of Mr. Golapchandra Sarcar's translation.

for religious and secular purposes of as much value to the grandfather as the father. The obligation and the line represented by the grandson must continue unless it is extinguished altogether in the mode or modes prescribed by the *Shastras*, that is, by death or excommunication or by the giving of the grandson himself in adoption by his father. Nowhere do the *Shastras* say that they are extinguished by the mere fact of the father having been given in adoption.

The declaration, made by the person taking the Hindu in adoption at the adoption ceremony, runs as follows:—

"In order to create between this person on the one hand, and me and the like on the other hand, various reciprocal obligations consequent on the various mutual relations, such as those of father and son; I am going to adopt (this person as) a son." (Mandlik's Hindu Law, p. 64, lines 19 to 23.)

Here again, "the reciprocal obligations" spoken of are those to arise in future, that is, after the adoption, as a consequence of it. One of those obligations is for the adopted son to beget a son and thereby discharge the *pitru runa* or paternal debt. That cannot mean discharging a debt by means of a son born before the adoption, who has already served to discharge another debt, due to the ancestors in the natural family of the adopted son.

So far, then, as the texts and commentaries bearing directly on the question of adoption are concerned, they do not support the case for the respondent. They deal merely with the personal *status* of the man or boy given in adoption; and do not purport to affect the *status* of his son, begotten before adoption.

But it is argued that when a married man is given in adoption, his wife passes with him into the adoptive family—she, like him, acquires the new *gotra*; that what applies to the wife of the man adopted must apply to his son also, begotten before the adoption, because, both according to the Smriti writers and their commentators, a man's wife and sons go together. In support of this argument reliance is placed on a text of Narada cited by Vijnaneshvara in his chapter on "Resumption of Gifts" in the Mitakshara (p. 225, Moghe's 3rd Ed.).

That text says that a man shall not make a gift or sale of his sons and wife. The reason for that rule, as given by Nilakantha

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in the *Vyavahara Mayukha*, is that "there being no ownership over a wife as there is in a cow, &c., there cannot be any property in the children begotten on her," (Mandlik's Hindu Law, p. 35, lines 32 and 33.) This merely propounds the law so far as a man's power to make a gift or sale of his wife and children is concerned. It does not follow from it that the man's relations to the children are the same in every respect as his relations to his wife. When he is given in adoption, his wife passes with him into the adoptive family, because, according to the *Shastras*, husband and wife form one body. A woman can be given in marriage but once. (Mandlik's Hindu Law, p. 169, para. 65.) For the purposes of *dharma* (religion), *artha* (wealth), and *kama* (desires), she and her husband are inseparably united; as long as her husband is alive, the wife is dependent on him; with her he has to worship the domestic fire; she is necessary to him for family sacrifices; in short, as a commentator puts it, "the relation of husband and wife is one of close proximity." If the husband becomes contaminated by one of the deadly sins (*mahá pátaka*), the wife has to wait till he is purified. On her death, her funeral ceremonies have to be performed by the family (*gotra*) of her husband, if her marriage has been according to one of the approved forms. That is, by the *gotra* to which the husband belonged at her death. This intimate relation between husband and wife makes it necessary and natural that when the husband is given in adoption, his wife should pass too, because the lot of the one is cast with that of the other. But that kind of intimate relation does not exist as between a father and his son. It is true that, according to the *shastras*, there is a certain kind of identity between them. "The father," it is said, "is reproduced in the son." The meaning and import of that is explained in the judgment of this Court in *Gangu* v. *Chandrabhagabai* [1] which deals with the question of the exclusion of persons under disability from inheritance.

The theory of identity between a father and his son recognised by the *shastras* does not mean that they are one body as husband and wife are. It means that they are to some extent co-equals. Adoption does not disqualify a man for inheritance or a share

(1) (1907) 32 Bom. 275 at p. 284.

at a partition in the same way as disqualifying causes such as impotence, excommunication from caste, blindness, lunacy, and the like. The latter deprive a man absolutely of the right to inherit and the right to partition. Adoption, on the other hand, substitutes those rights in the family of adoption for those acquired in the family of birth. No complete analogy can, therefore, be drawn for the purposes of the question we are now discussing from the texts on the subject of exclusion from inheritance or partition of persons disqualified.

But, assuming that an analogy can properly be drawn, it is rather against than in favour of the respondent's case. The leading text on the subject of disinherison mentions the persons disqualified, but does not mention their sons except in the case of the outcaste. Even in that case, it is only the son born after the father's excommunication who is included among disqualified heirs. The next text refers to the *aurasa* and *kshetraja* sons of the persons disqualified. In the case of these sons, that text says, no disqualification can exist, if they are personally free from the disabilities mentioned in the preceding text. This second text, says Vijnaneshvara in his gloss in the Mitakshara, became necessary because of the preceding text "implying" that the father's disqualification leads also to the son's disqualification. Not that it necessarily implies, but that the second text is intended to remove a doubt which might arise in consequence of the mutual relations of father and son.

Now, in dealing with the question of exclusion from inheritance, the *smriti* writers and the commentators have taken care to point out expressly that certain kinds of sons do not but other kinds of sons do share their father's disqualification. But they have not done that in dealing with the subject of adoption.

If it be argued that the reason for providing a special text, exempting the *aurasa* and *kshetraja* sons from sharing their father's disqualification for inheritance, could only be that, but for that special text, those sons with the other kinds of sons would have been included in the father on the ground of the *Shastric* identity, the answer is furnished by the language of the leading text on the subject of disinherison. If, because of that identity, what disqualifies the father must disqualify the son also in all

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matters and especially in those relating to property, where was the necessity of specially referring in that text to the son begotten by an outcaste after the latter's excommunication and not mentioning at the same time the sons of the other disqualified persons? If a father and his son are identical so that what happens to the one must happen to the other, then it must follow that, if a father becomes an outcaste, or contract some other impurity, the son must also necessarily contract it. And yet every Hindu knows that is not the law or *shastra*.

But then, argues Mr. Jayakar, if it be held that the son of a Hindu, begotten before the latter's adoption, does not pass with the Hindu into his adoptive family but remains a member of the family of his birth, this result must follow that the son in question cannot, on the Hindu's death, perform the different obsequial ceremonies, due from every son to his deceased father, and that because the father in such a case has ceased to be his father by going into another *gotra* or family. The son can perform the *shraddha* and other death ceremonies of his grandfather, but the Shastras prescribe that in all these ceremonies the oblations must be offered to the soul of the father first, where the father has died. Here there is no father, he having gone into another family, and, if there is no father, the oblations to the grandfather and other ancestors cannot be given. This argument involves the assumption that, when a married man having a son is given in adoption, one result of the adoption is that it destroys the natural relation of father and son between them for the purposes of obsequial ceremonies. All that Manu's text, to which reference has been made in the foregoing part of this judgment, lays down is that *the man given in adoption* loses his natural *gotra* or family and the right to inherit the property of his natural father, and with them his right to offer *pinda* or funeral oblations to *his* natural father. But the text does not say that the son of that man, born before his adoption, ceases to be his son and loses the right to offer funeral oblations to his soul, in case of his death. For one thing, according to the Hindu Shastras, "by no means can you make your father cease to be" (Jaimini, Bibliotheca Indica Series, Vol. I, p. 742). The mere fact that the father has gone into another family by adoption and ceased to be of his son's *gotra* or family cannot unmake what he naturally is—the son's

father. The *gotras* of the two may differ in consequence of the adoption, but it is not always necessary for funeral ceremonies that the person performing them should be of the same *gotra* as the deceased. A sister's son and a son-in-law can perform those ceremonies and yet they are not of the same *gotra*. So a son begotten before the adoption of his father would be entitled to perform the latter's funeral ceremonies. All the *Smriti* says is that such ceremonies "shall be performed by a son." It does not make the obligation dependent upon the continuance of the father in the same *gotra* as the son.

In that case, argues Mr. Jayakar, the son must be also entitled to the father's property in his adoptive family. That is a *non sequiter*. According to Aparárka, a son must perform the funeral ceremonies of his father even where the father has left no property for the son to inherit. (Aparárka, Anandashrama series, p. 463.)

Manu's text says that the funeral oblation follows the inheritance, not the inheritance the funeral oblation. Nilakantha in the Vyavahara Mayukha makes this clearer. "The funeral rites of the deceased, as far as the 10th day inclusive, should be performed by whoever takes his wealth, including the king himself. And Vishnu says the same: 'He who takes the wealth is declared (to be) the giver of the *pinda* or funeral oblations'." (Mandlik's Hindu Law, p. 84, lines 15 to 20.) And Balambhatta explains in his commentary on the Mitakshara that "the right to offer funeral oblations and the right to take the deceased's property by right of heirship are not always co-extensive but they may be opposed" [1]. So also the Viramitrodaya:—

"The capacity for presenting funeral oblations is not alone the criterion of the right to heritage, since the younger brothers are entitled to the heritage although they are not competent to offer oblations while there is the eldest brother." (The Viramitrodaya, translated by Mr. Golapchandra Sarkar, p. 91.)

But, Mr. Jayakar asks, what if the man giving his son in adoption dies after the adoption, leaving him surviving that son and his son begotten before adoption? The man's son cannot

[1] पिण्डदत्वं न रिक्थहारित्वं व्याप्यमपितु विपरीत्।

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perform his funeral ceremonies, because Manu's text ordains that to be a necessary result of the adoption. Nor can that son's son perform it, because it is laid down [1] that no one who has his father alive shall perform any *shraddha*.

The answer is, that is the general rule, but to it there are several exceptions. It is unnecessary to specify the latter here. They are given in detail by Nilakantha in his *Shraddha Mayukha*[2]. Among the exceptions is a case where the father has become an ascetic (*sanyasta*) or an outcaste (*patita*). In such a case, says Nilakantha, the grandson has the right to perform all the ten *Shraddhas* [3]. The general rule in fact applies only where the grandfather has left a son qualified to perform the ceremonies. This is clear from a *Smriti* of Katyayana quoted by Madhavacharya in his *Parashara Samhita* (Bombay Oriental series, Vol. I., Part II, p. 462), which says:—

"A grandson should not perform the funeral ceremonies of the grandfather if the grandfather has (died leaving) a son."

If the grandfather dies after having given his son in adoption, he must be regarded as having died sonless for the purposes of his funeral ceremonies, and of succession to his property. The grandson in that case takes the son's place. It is not correct, therefore, to say that a grandson has no power in any case to present oblations so long as the father is alive. As is pointed out by Mitra Misra in the *Viramitrodaya* "the fitness for presenting oblations ..... is not wanting in grandsons too (while their father is alive)" (Translation by Mr. Golapchandra Sarkar, p. 91)

For these reasons the question argued in this appeal and stated at the commencement of this judgment must be answered in the negative. The result is that the appeal must be allowed, the decree of the Subordinate Judge reversed, and the claim of the appellant awarded with costs throughout on the respondents.

Decree reversed.

G. B. R.

[1] जीवे पितरि वै पुत्रः श्राद्धकार्यं विवर्जयेत्।

[2] नैव पौत्रेण कर्त्तव्यं पुत्रवांश्चेत् पितामहः। (Shraddha Mayukha.)

[3] The reference is to pages 22, 23 and 24 of the edition published by Mahadeo Gopal Sastri Amrapurkar, Jnana Durpan Press.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

MAHANTAWA KOM IRAPPA (ORIGINAL DEFENDANT 4), APPELLANT, *v.* GANGAWA KOM MALAPPA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1 AND 3), RESPONDENTS.* 1909. *July* 15.

Hindu Law—Panchals—Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality—Burden of proof.

A marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe.

The onus lies upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom.

Inderun Valungypooly Taver v. *Ramasawmy Pandia Talaver* (1) and *Fakirgauda* v. *Gangi* (2), followed.

SECOND APPEAL from the decision of T. D. Fry, District Judge of Dhárwár, confirming the decree of V. V. Kalyanpurkar, Subordinate Judge of Haveri.

The plaintiff sued to recover from the defendants the property in suit alleging that the property belonged to her deceased father Udcha, that it was in the possession of her step-mother Savakka, and that Savakka having remarried the inheritance devolved on the plaintiff. Savakka was joined in the suit as defendant 3 and defendants 1, 2 and 4 were alienees from Savakka.

Defendants 1, 2 and 4 set up their title as vendees from Savakka.

Defendant 3 did not put in appearance.

The Subordinate Judge, V. V. Kalyanpurkar, found that the re-marriage of defendant 3 was proved, but he found in the negative as to the necessity for the alienations by her. He, therefore, allowed the plaintiff's claim.

On appeal by defendant 4 the District Judge found that, though the re-marriage of defendant 3 was proved, still the question as to validity of the re-marriage should have been

* Second Appeal No. 785 of 1909.

(1) (1869) 13 Moo. I. A. 141. (2) (1896) 22 Bom. 277.

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raised and considered by the Subordinate Judge inasmuch as defendant 3's husband, Basappa, belonged to the Panchal (artificer) caste and defendant 3 belonged to the Kurbar (shepherd) caste, both castes being sub-divisions of the Shudra tribe. The case was therefore remanded for a finding upon the issue, "Was Savakka's re-marriage with Basappa a valid marriage?"

On the said issue the finding of the Subordinate Judge, V. G. Kaduskar, was in the negative.

The respondents, that is, the plaintiff and defendants 1 and 3, raised objections to the finding.

The District Judge, however, found in appeal that Savakka's re-marriage was valid and that the alienations by her were not binding on the plaintiff. He, therefore, confirmed the decree. With respect to the validity of the re-marriage the Judge made the following observations :—

In disposing, after remand, of the second issue, Mr. Kaduskar has found himself unable to accept the ruling in *Upoma Kuchain* v. *Bholaram Dhubi* (15 Cal. 708). I take it however that Mr. Kaduskar's attention was not drawn to the fact that the judgment to which he takes exception was quoted with approval by the Bombay High Court in *Fakirgowda* v. *Gangi* (22 Bom. 277) and that both these decisions are founded on the judgment of the Privy Council in *Inderun* v. *Ramasawmy* (Moore, Vol. XIII, p. 141).

The concluding words of the judgment of the Privy Council may be quoted. Those words are: "On the whole seeing that those parties are both of the Sudra caste and that the utmost that has been alleged really is, that the Lomindar was one part of the Sudra caste, and the lady to whom he was married was of another part, or of a sub-caste, their Lordships hold the marriage to have been valid; to hold the contrary would in fact be introducing a new rule, and a rule which ought not to be countenanced."

I follow these rulings as a matter of course * * * .

All that the Courts decide is that two Sudras of different parts of the caste can contract a marriage which the Courts will regard as valid in law. Whether the members of the different divisions will regard such marriages with disapproval and will take action accordingly is a question into which the Courts have not entered and are not likely to enter.

In the case now before me the parties to the marriage were admittedly Sudras—a Kurbar and a Panchal. Under the rulings quoted the marriage which, as I have held, was contracted between them was valid unless it is

proved that the marriage was prohibited by immemorial custom (see the Bombay ruling cited above).

The evidence in this case certainly does not establish any prohibition by immemorial custom and it seems impossible to attach much importance to the necessity for what has been referred to as "conversion". On that point I am impressed with Mr. Kalyanpurkar's remark: "I feel tolerably sure that considering the superiority of the Panchal caste (*i. e.*, Basappa's caste) over the Kurbar (*i. e.*, Savakka's caste) there can be no objection to the validity of such a marriage."

This would be in accordance with the old rule cited by Mayne on page 106 of his 7th edition. "Originally marriages between men of one class and *women of a lower* were recognized."

The further treatment in this work of such marriages as obsolete cannot be accepted here in view of the remark on that point in 15 Cal. 711. I hold that the marriage was valid.

Defendant 4 preferred a second appeal.

M. B. Chaubal (Government Pleader) and *G. S. Mulgaumkar* appeared for the appellant (defendant 4):—The sole question is about the validity of Savakka's marriage with Basappa. They belong to entirely different castes. Under this circumstance it cannot be said that Savakka has gone into another family by her re-marriage and thus lost all her interest in her deceased husband's property. Basappa's caste is Panchal, while Savakka's is Kurbar. The validity of the marriage must depend upon the custom of the caste with regard to such marriage. Panchal is a caste akin to Brahmin: (Steele on Hindu Customs, pp. 352 and 356). A Panchal like a Brahmin has to perform Thread Ceremony (investiture of sacred thread). In other respects their rights are taken from the Kamlakar Sutra or the Sacred Ordinances of the Shudra caste. It is the custom of the caste that can validate such a marriage. The lower Court has relied upon the decision of the Privy Council in *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*[1]. We submit that that case is distinguishable. There the marriage was between a Shudra male and an illegitimate female. An illegitimate person, whether a male or female, has no caste at all and such a marriage does not come within the pale of Hindu Law. We rely upon

(1) (1869) 13 Moo. I. A. 141.

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the remarks on p. 71 of Tagore Law Lectures, Hindu Marriage and Stridhan. The ruling in *Fakirgauda* v. *Gangi*[1] lays down that the marriage between members of two sub-divisions of the Lingait caste is not invalid. But in the present case the very fact that Basappa and Savakka are excommunicated shows that the custom of the caste does not recognize such a marriage. The decision in *Upoma Kuchain* v. *Bholaram Dhubi*[2] is against our contention. That case originated in Assam and perhaps the sub-divisions there were in the same caste.

G. S. Mulgaumkar:—We further rely upon *Narain Dhara* v. *Rakhal Gain*[3] and *Lakshmi* v. *Kaliansing*[4].

[BATCHELOR, J.:—In the last case the marriage was between a Brahmin girl and a Rajput husband. They were not members of the same class or tribe.]

N. A. Shiveshvarkar appeared for respondent 1 (plaintiff) :—The texts in support of a marriage like the one involved in the present case are Manu, Ch. III, cl. 12 *et seq*; Mitakshara, Ch. I, sec. 2, cl. 2 and note; Strange's Hindu Law, Vol. 1, p. 41, relying upon 3 Colebrook's Digest, 329 : see also Golap Chandra Sarkar's Treatise on Hindu Law (3rd Edn.), pp. 102, 104. Originally a marriage between a man of a superior caste and a woman of an inferior caste was permitted. It is only the later commentators that introduced the prohibition against inter-marriages. But the prohibition applies only to the three regenerate classes and not to the Shudra class. In *Narain Dhara* v. *Rakhal Gain*[3] the question as to the validity or otherwise of the marriage was not decided. There the question was whether from the fact that a man of the Kaivartta (fisherman) caste and a woman of the Tanti (weaver) caste lived as husband and wife for a period of twenty years, marriage in fact could be presumed to have taken place between them, and it was held that it could not be presumed inasmuch as the basis for such presumption was wanting in the case, the parties being members of two sub-divisions of the Shudra tribe between whom there was in practice no inter-marriage. That ruling does not lay

(1) (1896) 22 Bom. 277.
(2) (1888) 15 Cal. 708
(3) (1875) 1 Cal. 1.
(4) (1900) 2 Bom. L. R. 128.

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down that an inter-marriage between such sub-divisions is legally invalid.

SCOTT, C. J.:—The question which has been argued before us on behalf of the appellant is, whether a marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe.

It has been held by the Judicial Committee in *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*[1] that when the factum of a marriage is proved the presumption is that it is valid in law and in that case there was nothing illegal in the inter-marriage of members of different sub-divisions of a Shudra tribe. The onus would, therefore, appear to lie upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom. That was the view taken by this Court in the case of *Fakirgauda* v. *Gangi*[2].

The learned District Judge in the case now before us has correctly applied the law as to onus. He says "the evidence in this case certainly does not establish any prohibition of immemorial custom." We must therefore hold that the marriage of Savakka with Basappa was a valid marriage and the appellant's case for that reason must fail.

We dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1869) 13 Moo. I. A. 141.

(2) (1896) 22 Bom. 277.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909. *July* 16.

HARIHAR KANTA BHATTA (ORIGINAL PURCHASER), APPELLANT, *v.* RAMA PANDU SHETTI AND ANOTHER (ORIGINAL JUDGMENT-DEBTOR AND DECREE-HOLDER), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 244, 310A, 311—Decree—Execution—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under section 310A when they also fall under section 244, Civil Procedure Code, 1882.

Within a month of the sale at a Court auction, the judgment-debtor applied to the Court to set aside the sale on the ground that owing to conspiracy among the villagers (including the decree-holder) the sale was at an undervalue. A week later, but within the month allowed, he again applied to the Court to set aside the sale under section 310A of the Civil Procedure Code (Act XIV of 1882), depositing the amount as required by the section. The Subordinate Judge rejected the second application on the ground that it did not lie as the judgment-debtor had already applied to set aside the sale on the ground of irregularity under section 311 of the Code. This order was on appeal reversed by the District Judge. On appeal to the High Court, it was contended, first, that the order passed by the Subordinate Judge was not appealable; and, second, that the second application could not be granted because the judgment-debtor had already applied to set aside the sale under section 311 of the Code.

Held (1) that the order passed by the Subordinate Judge was appealable.

Pita v. *Chunilal*(1) followed.

(2) that the allegation in the first application being that the sale had been brought about by the fraud of the residents of the village where the lands were situate and where the decree-holder resided, the application must be regarded as an application under section 244 and not under section 311 of the Code of Civil Procedure of 1882.

Decree of the District Judge confirmed.

Golam Ahad Chowdhry v. *Judhister Chundra Shaha*(2) followed.

SECOND appeal from the decision of P. J. Talyarkhan, Acting District Judge of Kánara, reversing the decree passed by K. R. Natu, Subordiante Judge at Kumta.

Proceedings in execution.

* Second Appeal No. 841 of 1908.

(1) (1906) 31 Bom. 207; 9 Bom. L. R. 15. (2) (1902) 30 Cal. 142.

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One Vireshwar obtained a decree against Rama Pandu Shetti. In execution of that decree property belonging to the latter was sold at a Court auction and purchased by Harihar Kanta Bhatta on the 17th January 1908.

The judgment-debtor Rama Pandu applied to the Court on the 8th February 1908 for setting aside the sale on the ground that the property was sold at undervalue owing to conspiracy among the villagers who included the decree-holder. That application was rejected.

On the 15th February 1908, he again applied to the Court under section 310A of the Civil Procedure Code, 1882, and deposited the amount required.

The Subordinate Judge rejected the application on the following grounds:—

This application is opposed by both the decree-holder and the Court purchaser (*vide* exhibits 20 and 21). They say that this application is not tenable under the proviso to section 310A, Civil Procedure Code, as the applicant had formerly made an application under section 311, Civil Procedure Code. Such an application under section 311, Civil Procedure Code, was made by this judgment-debtor on 8th February 1908 (*vide* exhibit 16). The sale took place on 17th January 1908. It was rejected. This application under section 310A is not hence tenable under the proviso to section 310A.

From this order there was an appeal to the District Judge, who reversed the order passed by the Subordinate Judge. The reasons for his decision were expressed as follows:—

According to the latest rulings of the Calcutta, Madras and Allahabad High Courts an order under section 310A of the Civil Procedure Code is one under section 244, clause (*c*) of that Code, and is consequently appealable (*vide* I. L. R. 28 Cal. 73; 30 Mad. 507 and 29 All. 275). The Bombay High Court has, without going so far, recently held that a question under section 310 may be one relating to execution, discharge or satisfaction of the decree or to the stay of execution thereof under section 244 (*c*), and, where that is the case, an appeal will lie from an order passed under section 310A (*vide* I. L. R. 31 Bom. 207). I am bound to follow this last ruling and so proceed to consider whether in the present case there was any question between the decree-holder and the judgment-debtor relating to execution, discharge or satisfaction of the decree or to the stay of execution thereof. On the facts I find that there was. The judgment-debtor's application was opposed by the decree-holder on the grounds (1) that the judgment-debtor had previously applied under section 311; (2) that he had not deposited a sum sufficient to satisfy the other decree-holders (who had applied

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for rateable distribution); and (3) that the sum deposited did not appear to be sufficient to satisfy even his decree. The last two grounds clearly raised questions falling under section 244 (*c*). In the Bombay case above referred to the second of the above three grounds was held to bring the case under section 244 (*c*). I therefore hold that the order of the lower Court is appealable.

The lower Court had refused to set aside the sale on the ground that the judgment-debtor had previously applied under section 311, Civil Procedure Code. Exhibit 16 is the previous application. That application does not at all show that it was made under section 311. That section is confined to applications made for setting aside a sale on the ground of an alleged irregularity in publishing or conducting it. No such irregularity was, however, alleged in the application in question. What the applicant had alleged was that his enemies had combined with the village people and told them not to bid at the sale. It was not alleged that any intending purchasers were dissuaded from bidding while the sale was taking place, though even if this had been done, I do not think that it could be called an irregularity in conducting the sale. It is thus clear that the sale was sought to be set aside on the ground of fraud and not on the ground that any irregularity in publishing or conducting the sale had been committed. That the Subordinate Judge himself had not treated the application as one falling under section 311 at the time it was presented is clear from the fact that he had summarily rejected it on the very day it was presented. For these reasons, I hold that lower Court was wrong in refusing to set aside the sale on the ground that the judgment-debtor had previously applied under section 311. I hold that there was no such application.

The auction-purchaser appealed to the High Court.

Nilkanth Atmaram, for the appellant:—We submit, first, that the order passed by the Subordinate Judge is not appealable. The auction-purchaser here is a stranger: he is not the decree-holder. In such a case no appeal is provided for by section 88 of the Civil Procedure Code of 1882. See *Chundi Charan Mandal* v. *Banke Behary Lal Mandal*[1]; *Jogodanund Singh* v. *Amrita Lal Sircar*[2]; *Bungshidhar Haldar* v. *Kedar Nath Mondal*[3]; *Kedar Nath Sen* v. *Uma Charan*[4].

The decision in *Pita* v. *Chunilal*[5] turned upon the particular facts of the case.

Secondly, the judgment-debtor having once applied to the Court under section 311 of the Civil Procedure Code of 1882 for

(1) (1899) 26 Cal. 449.
(2) (1895) 22 Cal. 767.
(3) (1896) 1 C. W. N. 114.
(4) (1900) 6 C. W. N. 57.
(5) (1906) 31 Bom. 207; 9 Bom. L. R. 15.

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setting aside the sale, no subsequent application under section 310A of the Code could be entertained. The very terms of section 310 forbid it. Where a sale has taken place, it can only be set aside under section 311 of the Civil Procedure Code of 1882. See *Malkarjun* v. *Narhari*[1].

K. H. Kelkar, for the judgment-debtor:—The case of *Pita* v. *Chunilal*[2] applies, and therefore an appeal lay to the District Court. The first application was not an application under section 311 at all. The District Judge was also of that opinion. The second application under section 310A was therefore competent: and under the mandatory provisions of section 310A the Court was bound to entertain it.

CHANDAVARKAR, J.:—Two points of law have been urged in support of this second appeal. The facts, stated shortly, are these:—The property had been sold by the Court on the 17th of January 1908, in execution of a decree against the respondent. On the 8th of February 1908, he applied to the Court to set aside the sale. That application was made upon the ground that the people of the village, where he resided and where the property was situate, had so conspired as to bring about the sale for under-value. The application (exhibit 16) was rejected. On the 15th of February 1908, the respondent applied to the Court under section 310A and deposited the amount required by that section. The appellant objected upon the ground that the application could not be entertained, because the judgment-debtor, (respondent) having made an application under section 311, was debarred by the provisions of section 310A from claiming any relief under the latter section.

The Subordinate Judge allowed the objection and rejected the respondent's application under section 310A. The District Court, on appeal by the respondent, has reversed the order of the Subordinate Judge. It was argued before the District Judge that no appeal lay against the order of the Subordinate Judge. The District Judge, relying upon the decision of this Court in *Pita* v. *Chunilal*[2], held an appeal lay.

(1) (1900) 25 Bom. 337 at p. 352. (2) (1906) 31 Bom. 207; 9 Bom. L. R. 15.

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Before us it has been argued that the District Judge was wrong in holding that an appeal lay to his Court against the Subordinate Judge's order under section 310A. We agree with the District Judge. The case is similar to that of *Pita* v. *Chunilal*[1].

Then it is argued that the judgment-debtor's application under section 310A could not be granted, because he had applied to set aside the sale under section 311. But was it an application under that section? It may be that, when the respondent presented the application, he presented it as one falling under that section, but the question is, not what he thought or what section he had mentioned in his application, assuming that as a matter of fact he had mentioned section 311 and none else. The substance of the grounds upon which he had made the application to set aside the sale must be looked to. If the allegations, on the strength of which the respondent asked the Court to set aside the sale, did not bring it within the grounds specified in section 311, the mere mention of the section could not in law make it an application under it. So looked at, it did not fall within the provisions of section 311, but it must be regarded as an application under section 244. The allegation was that the sale had been brought about by the fraud of the residents of the village where the lands were situate. It is admitted that the decree-holder and the judgment-debtor were residents of the same village, so that the fraud was one imputed to them as it was to other villagers. If that is so, the application was not under section 311 but in reality was one to set aside the sale for fraud under section 244. That such an application could be made so as to attract to it the provisions of section 244 was decided by the High Court of Calcutta in *Golam Ahad Chowdhry* v. *Judhister Chundra Shaha*[2], with the principle of which we concur. Therefore this ground argued before us must fail. We confirm the decree with costs.

HEATON, J.:—I agree with the order proposed. I wish to add a few words about one argument. It is contended that every application to set aside a sale must be an application under section 311 of the Code; in other words whatever its nature and

(1) (1906) 31 Bom. 207; 9 Bom. L. R. 15. (2) (1902) 30 Cal. 142.

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whatever the grounds on which it proceeds it must come under that section. The argument so stated I think refutes itself; but if further refutation is needed, it will be found in two specific cases which dealt with applications to set aside sales which were held not to be made under section 311. These are *Golam Akad Chowdhry* v. *Judhister Chundra Shaha*[1] and *Parashram* v. *Balmukund*[2]. I wish only to add that I consider that the District Judge has given ample reasons for the conclusion at which he has arrived and his decree should be confirmed.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

PUNDALIK UDAJI JADHAV, PLAINTIFF, *v.* THE AGENT, S. M. RAILWAY COMPANY.*

1909.
July 22.

The Indian Railways Act (IX of 1890), section 75, Schedule II, clause (l)—Parcel containing articles liable to be insured and also not liable to be insured—Loss of the parcel in transit on Railway line—Suit against Railway Company to recover damages with respect to goods not liable to be insured—Railway Company not liable—Articles—Package.

Plaintiff's agent at Poona consigned a parcel to plaintiff at Dhárwár. The parcel contained goods which, according to section 75 and Schedule II of the Indian Railways Act (IX of 1890), were liable to be insured as well as those not so liable. The parcel was lost in transit on the Southern Marátha Railway Line. The plaintiff thereupon sued the Railway Company to recover damages for the loss of the goods which were not liable to be insured. The defendant Company denied liability.

Held that the Railway Company was not liable. The words of section 75 of the Railway Act (IX of 1890) draw a distinction between articles mentioned in Schedule II of the Act and the parcel or package in which they are contained and provides that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package.

* Civil Reference No. 4 of 1909.

(1) (1902) 30 Cal. 142. (2) (1908) 32 Bom. 572; 10 Bom. L. R. 752.

1909.

PUNDALIK v. S. M. RAILWAY COMPANY.

REFERENCE by R. G. Bhadbhade, First Class Subordinate Judge of Dhárwár in his Small Cause jurisdiction under Order 46, Rule 1 of the Civil Procedure Code (Act V of 1908).

The facts which gave rise to the reference were as under :—

The plaintiff's agent at Poona consigned a parcel to the plaintiff at Dhárwár. The parcel contained silk and lace goods worth Rs. 145-4-0 and cotton fabrics worth Rs. 101-4-0. The parcel was lost in transit on the Southern Marátha Railway Line owing to the negligence of the Railway Company. The plaintiff therefore brought a suit in the Court of the First Class Subordinate Judge of Dhárwár in its Small Cause jurisdiction to recover damages, namely, Rs. 114-13-0 for the loss of the cotton fabrics. He claimed no damages for the loss of the silk fabrics because his agent at Poona had failed to insure the parcel under section 75 of the Indian Railways Act (IX of 1890).

The defendant Company admitted the loss of the parcel in transit and contended that they were not liable for the loss of the parcel as the plaintiff had not declared the contents of the parcel and had not insured it on payment of a higher charge as required by section 75 of the Indian Railways Act and the rules of the Company.

On the said pleadings the Subordinate Judge raised the following point for decision :—

"Whether the plaintiff's *Dalal's* failure to declare the contents of the mixed parcel and insure the same absolves the defendant Railway Company for loss of the cotton fabrics which were not required by the Railway Act or rules framed thereunder to be insured ?"

The opinion of the Subordinate Judge on the point was in the negative.

He was, however, doubtful as to the correctness of his opinion and as his decree in the case was not appealable he referred the said point for an authoritative decision under Order 46, Rule 1 of the Civil Procedure Code (Act V of 1908). In making the reference the Subordinate Judge made the following observations :—

It is admitted by the defendants' pleader that under the repealed Railway Act of 1879 section 11 the defendants would have been liable for loss of the uninsurable fabrics. The view now pressed on the Court is that stated in the Commentary on the Railway Act by Messrs. Russell and Bayley, 2nd Ed., p. 199. It is stated therein that under the present section 75 protection extends to the entire parcel or package, including the articles which should, and those which need not have been declared. The words "of the parcel or package" in this section form an alteration of the law, and under section 11 of the repealed Act of 1879 and section 10 of the Act of 1854 protection was only extended to the contents of the parcel which should have been declared under those Acts. The above propositions appear from the foot note (*b*) of the Commentary to have been stated on the authority of two cases one decided by the Chief Court of Punjab (1) *Mohamed Abdul* v. *The Secretary of State for India in Council* (2) and a case decided in 1895 by the Court of the Small Causes at Bombay.

Defendants' pleader has been able to procure for my perusal Mr. Tiruvenkatacharya's Railway cases in which the first case has been reported at p. 23. I have not been able to procure the copy of the Times of India in which the second case is said to be reported.

With due deference to the Judges of the Punjab Court, I must say that I do not share in their view and that of the learned Judge who referred the question for their opinion as to the construction of section 75 of the Railway Act of 1890.

In section 11 of the Act IV of 1899 the words (material for this case) are "the carrier by Railway shall not be liable for loss, &c., *to such property* unless the value, &c., are declared." In the new Act the words "loss, &c., of the parcel and package" are substituted for loss of such property.

A mere cursory reading might lead one to suppose that the Railway Company being exempted for loss of an uninsurable parcel the exemption extends to a mixed parcel containing goods not required to be insured. The Legislature has not made it a criminal offence on the part of a consignor to send a parcel without insurance if he so pleases.

It is admitted that under the English Carriers Act and the old Railway Acts the defendants' Company would have been liable for loss of the cotton fabrics.

Section 75 of the present Act appears under Ch. 7 about the responsibility of Railway Administration as common carriers. That chapter after stating the general liability of the Railway Company under section 72 makes further provisions in certain specified cases by section 73 as regards animals and by section 75 as regards articles of special value.

Under the usual canons of construction section 75 must be confined to the articles of special value mentioned in the second schedule of the Railway Act as to which insurance may be said to be in a way compulsory if the owner wishes to hold the Company liable for loss of his parcel on any account.

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PUNDALIK v. S. M. RAILWAY COMPANY.

In Maxwell on the Interpretation of Statutes, 4th Ed., p. 89, it is stated..... In the interpretation of general words and phrases the principle of strictly adapting the meaning to the particular subject-matter in reference to which the words are used, finds its most frequent application while expressing truly enough all that the Legislature intended they frequently express more in their literal meaning and natural force.

That in such cases general words are to be restricted to the fitness of the matter with reference to the subject-matter in the mind of the Legislature. Further there is a presumption that the Legislature does not intend to make any alteration in the Law beyond what it expressly declares by express terms or by implication (Maxwell pp. 122, 123).

I do not therefore think that the construction of section 75 of the Railway Act adopted by the Punjab Court is right. Under the Indian Law Reports Act (XVIII of 1875, section 3) this Court is not bound to follow that Court's ruling or that of the Bombay Court of Small Causes.

However in view of the above rulings, and having regard to the liberal grammatical construction of section 75, I entertain some doubt as to the correctness of my opinion and as there is no ruling on the point by the other High Courts, I submit the question for an authoritative decision by the High Court.

Shankarrao N. Karnad (amicus curiæ) for the plaintiff:—The responsibility of a Railway Company for loss of goods entrusted to them is governed by section 72 of the Railway Act. This section saddles the Company with liability in general as that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. If the goods are of special value such as those mentioned in the second schedule of the Railway Act, then section 75 applies. This section requires that the sender, in order to claim compensation for loss, must cause the value of the goods contained in the package to be declared at the time of delivery of the parcel to the Railway Company. The package in this case was a mixed parcel. It contained cotton as well as silk goods. Section 75 contemplates a package of silk goods alone. It does not refer to a package of mixed goods. The words "of the parcel or package" have made an alteration in the old law. The section in the Acts of 1854 and 1879 which correspond to section 75 of the present Act should be considered in determining the scope of that section. It is submitted that section 75 should be construed liberally: Maxwell on the Interpretation of

Statutes, 4th Ed., pp. 89, 122 and 123. Sections 72 and 75 do not exclude each other. Where the package contains articles of special value along with others, section 75 would apply to the goods of special value and in the case of the other goods, section 72 would apply. Section 75 applies only to goods mentioned in the second Schedule while with respect to other goods contained in the package, the Railway Company would be responsible for their loss under section 72. The Punjab case referred to by the Subordinate Judge in his reference was decided under the old Acts.

S. V. Palekar (amicus curiæ) for the defendant was not called upon.

SCOTT, C. J. :—We are of opinion that the protection given by section 75 of the Indian Railways Act (IX of 1890) extends to the whole parcel in which silk goods such as are mentioned in clause (*l*) of the 2nd Schedule are contained, whether the rest of the parcel is composed of articles mentioned in the 2nd Schedule or not.

This appears from the words of the section which draws a distinction between the articles mentioned in the Schedule and the parcel or package in which they are contained, and provides that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package.

We therefore answer the point submitted for our decision in the affirmative.

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909. *July* 22.

BHAGAVANDAS DHARAMSI (ORIGINAL PLAINTIFF), APPLICANT, *v.* A. BESSE FRENCHMAN (ORIGINAL DEFENDANT), OPPONENT.*

Aden Courts Act (II of 1864), sections 8 and 9†—Presidency Small Cause Courts Act (XV of 1882), section 69—Resident's Court—Application to state a case to the High Court—Application unconditional before delivery of judgment.

A party requiring a case to be stated by the Resident at Aden to the High Court of Bombay, under section 8 of the Aden Courts Act (II of 1864) should make an unconditional application to him in that behalf before judgment is delivered.

Ralli Brothers v. *Goculbhai Mulchand*(1) and *Bank of Bengal* v. *Vyabhoy Gangji*(2) applied.

Section 9 of the Aden Courts Act (II of 1864) gives the Resident the same option of either reserving his judgment or delivering it contingent on the opinion

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* Civil Application No. 78 of 1909 under extraordinary jurisdiction.

(1) (1890) 15 Bom. 376. (2) (1891) 16 Bom. 618.

† Sections 8 and 9 of the Aden Courts Act (II of 1864) are as follows:—

(8) No appeal shall lie from any decision or order of the Resident given or made by him, whether in the exercise of his original jurisdiction, or in the exercise of his jurisdiction as a Court of appeal or of revision; but if, in the trial of any suit in which the claim estimated as aforesaid shall not exceed one thousand rupees in value, any question of law or of usage having the force of law or of the construction of a document affecting the merits of the decision shall arise, on which the Resident shall entertain doubts, the Resident may, either on his own motion, or on the application of any of the parties to the suit, draw up a statement of the case and submit it, with his own opinion, for the decision of the High Court of Judicature at Bombay.

And if, in the trial of any suit or the hearing of an appeal in any suit in which the claim estimated as aforesaid shall exceed one thousand rupees in value, any question of fact or of law or of usage having the force of law or of the construction of a document affecting the merits of the decision shall arise, the Resident shall, on the application of any of the parties to the suit, or he may on his own motion draw up a statement of the case and submit it, with his own opinion, for the decision of the said High Court,

(9) The Resident may proceed in the case notwithstanding a reference to the High Court, and may pass a decree contingent upon the opinion of the High Court on the point referred; but no execution shall be issued in any case in which a reference shall be made to the High Court, until the receipt of the order of that Court.

of the High Court as section 69 of the Presidency Small Cause Courts Act (XV of 1882) gives to the Presidency Small Cause Court.

APPLICATION under the extraordinary jurisdiction (section 155 of the Civil Procedure Code, Act V of 1908), against the decision of Major General E. De Brath, Political Resident, Aden, confirming the decree of Major J. R. Carter, Assistant Political Agent, Aden.

The plaintiff sued the defendant for the recovery of Rs. 8,077-11-6, being the balance of the amount advanced to the latter from the 15th September 1907 to the 12th January 1908 as per account attached to the plaint.

The Assistant Political Agent who tried the suit dismissed it with costs.

On appeal by the plaintiff, one of the prayers urged in the appeal was as follows:—"If, however, after considering all the circumstances, your Honour feels any reasonable doubt as to such a finding in my favour as regards the sugar item, I submit that your Honour will be pleased under section 8 of Aden Act II of 1864 to draw up a statement of this part of my case and submit it with your Honour's opinion to the Honourable High Court at Bombay." The Political Resident, however, who heard the appeal confirmed the decree without making the reference prayed for.

The plaintiff, thereupon, presented an application to the High Court under its extraordinary jurisdiction (section 155 of the Civil Procedure Code, Act V of 1908), urging that the Political Resident should have referred the case to the High Court under section 8 of the Aden Act and that he had no jurisdiction to decide the case finally. A rule *nisi* having been issued to the defendant to show cause why the decree of the Political Resident should not be set aside.

J. B. Patel with *L. A. Shah* appeared for the applicant (plaintiff) in support of the rule.

K. N. Koyaji appeared for the opponent (defendant) to show cause.

SCOTT, C. J.:—This is an application under section 115 of the Civil Procedure Code of 1908 for revision of a decree passed in appeal in a civil case by the Resident of Aden.

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BHAGAVAN-DAS DHARAMSI v. A. LESSE FRENCHMAN.

A suit was instituted by the applicant in the Court of the Assistant Resident and was decided against him by that Judge.

An appeal was then preferred to the Resident with a statement of the appellant's case in which after setting forth his contentions with regard to a certain question regarding sugar which arose in the case, he said: "If, however, after considering all the circumstances your Honour feels any reasonable doubt as to such a finding in my favour as regards the sugar item, I submit that your Honour will be pleased under section 8 of the Aden Act II of 1864 to draw up a statement of this part of my case and submit it with your Honour's opinion to the High Court at Bombay."

The Resident having considered the argument advanced affirmed the decision of the Assistant Resident and did not draw up a statement of the case and submit it with his opinion for the decision of the High Court.

It is contended on behalf of the applicant that the Resident was bound, upon the application to which we have referred, to draw up a case and submit it for the decision of this Court in accordance with the provisions of section 8 of Aden Act II of 1864.

On behalf of the opponent it has been contended that no such application as is contemplated by that section was made to the Resident because the application which was made was a conditional application not to be acted upon unless the Resident felt reasonable doubt as to the correctness of the appellant's contentions.

In our opinion the argument of the opponent must prevail. The provisions of section 8 of the Aden Act are, in all material respects for the purposes of this case, the same as those of section 69 of Act XV of 1882, the Presidency Small Cause Courts Act, and we have the recorded opinion of Judges of this Court that any party requiring a case to be stated under that section of the Small Cause Courts Act is bound to make an unconditional application before the delivery of judgment. Thus in the case of

Ralli Brothers v. *Goculbhai Mulchand*[1], Mr. Justice Farran says: "It appears to me that the party who requires the Small Cause Court to state a case must do so unconditionally before judgment is delivered. To require the Small Cause Court to deliver judgment and to state a case only in the event of such judgment being adverse to the party requiring the case, would deprive the Court of the power of reserving judgment until after the opinion of the High Court is obtained, which power is expressly conferred upon it by the Act." Again, this Court in a judgment delivered by Sir Charles Sargent in the case of the *Bank of Bengal* v. *Vyabhoy Gangji*[2] said: "The language of section 69 of the Small Cause Courts Act (XV of 1882) shows that the party requiring the Judge to make the reference to the High Court must do so before the Judge has delivered his judgment, as it gives the Judge the option, on being so required, either of postponing his judgment or delivering it contingent on the opinion of the High Court."

Now those remarks are directly applicable to the present case, because by section 9 of the Aden Act it is provided that the Resident may proceed in the case notwithstanding the reference to the High Court and may pass a decree contingent upon the opinion of the High Court on the point referred. It is to be observed that the word 'may' is used in this section while the word 'shall' is used in section 8. The permissive terms of section 9 are also in marked contrast with the imperative terms of the corresponding provision in section 7 of Act XXVI of 1864, the Presidency Small Cause Courts Act of the same year. We therefore think that section 9 of the Aden Act gives the Resident the same option as section 69 of the Small Cause Courts Act of 1882.

As pointed out in the judgments above referred to, to allow of reservation of judgment, the application must be made unconditionally before delivery of judgment.

For these reasons we dismiss the application with costs.

Application dismissed.

G. B. R.

(1) (1890) 15 Bom. 376 at p. 387.

(2) (1891) 16 Bom. 618 at p. 624.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909. *July* 23.

GANPATI AMBADAS GAYDHANI (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAGHUNATH ANANT GAYDHANI (ORIGINAL DEFENDANT), RESPONDENT.*

Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession.

Plaintiff sued for a declaration that he was the owner of the land in suit alleging that the defendant had taken wrongful possession thereof. It was found as a fact that the title to the land was in the plaintiff and that the defendant had made no permanent use of the land inconsistent with its being plaintiff's land.

Held, that plaintiff was entitled to succeed. The said circumstances made out a case for the application of the presumption that possession goes with title. *Runjeet Ram Panday* v. *Goburdhun Ram Panday*(1) and *Agency Company* v. *Short*(2) followed.

Framji Cursetji v. *Goculdas Madhowji*(3) referred to.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, reversing the decree of C. D. Kavishvar, First Class Subordinate Judge.

Plaintiff sued in the year 1906 to have it declared that the land in suit belonged to him, to obtain possession of it, to recover Rs. 45 as damages for the defendant's wrongful possession and to obtain an injunction ordering the defendant to remove the superstructure raised by him on the land and restraining him from obstructing the plaintiff in the enjoyment of a door and well jointly with him. The plaint alleged that the land was plaintiff's ancestral property, that plaintiff's building had been erected on it for more than 22 years, that the land had been in plaintiff's possession and that the defendant took wrongful possession of it two months before the institution of the suit and began to build on it in spite of the plaintiff's protests.

* Second Appeal No. 141 of 1908.

(1) (1873) 20 W. R. 25 (Civ. Rul.). (2) (1888) 13 App. Cas. 793.

(3) (1892) 16 Bom. 338.

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Defendant contended that the allegations in the plaint were false, that the land belonged to the defendant and had been in his possession since a long time, that it did not belong to the plaintiff and was never in his possession, that the door and the well did not belong to the plaintiff and were never in his enjoyment, that the plaintiff never raised any protest against the defendant's structure and that the claim was time-barred.

The Subordinate Judge found that the plaintiff was proved to be the owner of the land in dispute, that the claim was not time-barred, that the plaintiff was entitled to obtain possession of the land and passed a prohibitary order against the defendant and a further order directing the defendant to remove his superstructure, and further held that the plaintiff was entitled to recover from the defendant Rs. 5 as nominal damages. He passed a decree accordingly.

On appeal by the defendant the District Judge found that the house-site belonged to the ancestors of the plaintiff and that the plaintiff had not been in occupation since 1880 when the ancestors of the plaintiff were expelled from the house and the building was pulled down by the ancestors of the defendant. He therefore held that the claim was time-barred by defendant's adverse possession and reversed the decree and dismissed the suit. His reasons were :—

It appears that the ancestors of the defendant expelled the ancestors of the plaintiff from the house about the year 1880 and that the plaintiffs have never been in occupation since. I cannot conceive of a better starting point of a claim adversely to the rightful owner than pulling down his house and expelling him. If then the defendant has since been in occupation and the land has not since remained empty space of no certain proprietorship the rightful owner must be barred. But it is clear from the sight of the place, that the site so invaded is enclosed so as to form part and parcel of the defendant's premises, and that it is actually part of the plinth of his house. It is, therefore, not a mere empty site adjacent to defendant's house such as those over which it is difficult to establish effective ownership but the enjoyment of it is inextricably and of necessity attached to the enjoyment of the defendant's premises as a verandah is part of a bungalow or a garden of a villa. In my opinion the plaintiff has been out of possession and the defendant in possession since 1880. I, therefore, reverse the finding and decree of the lower Court and dismiss the suit with costs in both Courts.

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The plaintiff having preferred a second appeal, the High Court (Scott, C. J., and Batchelor, J.) sent down the following issue for trial:—

"Whether the defendant has been in possession, if so, how long and whether adversely?"

In sending down the said issue the High Court made the following observations:—

In deciding the question of adverse possession the District Judge appears to have based his conclusion upon two circumstances. First, he says, that in 1880 there was a starting point of adverse possession, because the defendant's father pulled down the plaintiff's house and expelled him; and secondly, he says, that at the time of his view of the site, towards the end of 1907, the land in dispute was enclosed so as to form part and parcel of the defendant's premises and is actually part of the plinth of his house.

It does not appear to us that those two circumstances standing by themselves can in this case afford a safe basis for the conclusion that the defendant has been in adverse possession, for, as stated in the judgment of the first Court, the defendant's father was punished for pulling down the plaintiff's house in 1880. The judgment of the Magistrate filed as exhibit 55, shows that the accused Anant admitted in that case that the house belonged to the minor, that he had pulled it down and he said he would get it built again. In face of this admission which we take as an admission that Anant would not wrongfully claim the land from the plaintiff but would restore it to his possession with a new house upon it.

We are unable to agree with the District Judge that there is a good starting point for a claim of adverse possession, and in the absence of any finding of fact by the District Judge as to positive acts of exclusive possession by the defendant for the statutary period prior to suit, we are unable to accept the opinion expressed by him that the plaintiff has been out of possession and that defendant has been in possession since 1880.

With respect to the first part of the said issue the District Judge found that no one of the parties was in exclusive possession having regard to the position of the site, its surroundings and other circumstances in the case.

As to adverse possession he observed as follows:—

As for adverse possession I should express an opinion that the "admission" as to plaintiff's ownership was doubtless made. But is such an admission made by an accused to a Magistrate to avoid punishment equivalent to an undertaking given to the plaintiff to hold under him or to restore? It is, I submit, only in the latter case that the originally unlawful expulsion by the defendant

of the plaintiff would merge in a subsequent lawful and derivative occupancy and do not give rise to a starting point for limitation. It appears from the judgment of the Magistrate that he adjourned the case to allow of such an undertaking being given but in vain. There were also other violent acts, obstruction of doors and locking of persons up in rooms about the same time which gave rise to a wahiwat case. Exhibit 51. No admission was made in this case.

I should find then that if these acts are legally an assertion of ownership limitation ran from 1880, but if not there have been no acts subsequent to 1880 which would give a starting point for limitation.

The plaintiff-appellant filed cross-objections to the finding of the District Judge.

D. R. Patwardhan appeared for the appellant (plaintiff) :— The finding of the lower Court on the issue sent down by the High Court is not precise and does not amount to a finding of adverse possession. The finding as it stands cannot be taken to be a finding of adverse possession in law. The High Court, when it sent down the issue, held in its remand order that the admission of the plaintiff's title by the defendant's ancestor in the criminal case saved the bar of limitation and there was no subsequent act of adverse possession on the part of the defendant. The land being an open space and there being no evidence of defendant's adverse possession since his father's admission in 1880 the principle laid down in *Framji Curselji* v. *Goculdas Madhowji*[1] applies. In such cases possession goes with title: *Dharm Singh* v. *Hur Pershad Singh*[2].

R. R. Desai appeared for the respondent (defendant) :—It is found as a fact that in 1880 the plaintiff's ancestor was forcibly ejected by the defendant's ancestor. Since then the defendant's possession became adverse to the plaintiff. There is no evidence in the case showing that plaintiff's title was admitted. The alleged admission is merely referred to by the Magistrate in his judgment in the criminal case. This circumstance nnot be evidence of the admission. Moreover, the alleged admission was made to evade criminal liability and is inadmissible in evidence as proof of plaintiff's title. Further, the undertaking given in the alleged admission was never carried out, and it is found by

(1) (1892) 16 Bom. 338. (2) (1885) 12 Cal. 38.

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the lower Court that in the possessory suit brought by the plaintiff there was no such admission. All this happened more than twelve years prior to the present suit.

As to adverse acts subsequent to 1880, the defendant has repaired the compound wall and used the site as his court-yard to the exclusion of the plaintiff. Further the defendant has built a new house. We submit that such acts are evidence of adverse possession, therefore, the ruling in *Framji Curseiji* v. *Gocouldas Madhowji*[1] does not apply.

[SCOTT, C. J., referred to *Runjeet Ram Panday* v. *Goburdhun Ram Panday*[2].]

That case is distinguishable. There the defendant was not in possession. In the present case it is found that the defendant has continued in possession to the exclusion of the plaintiff and the *status quo ante* was never restored.

It is undisputed that in spite of the Mamlatdar's decree in the possessory suit the defendant has continued in possession and it is not proved that the plaintiff was ever in possession within twelve years of the suit.

SCOTT, C. J. :—In this case the plaintiff sues to have it declared that the land described in the plaint belongs to him and to recover damages from the defendant for wrongfully taking possession of it. He alleges that the defendant took possession of it wrongfully two months before suit.

The plaintiff obtained a decree in the first Court but in the lower appellate Court on an issue, which raised substantially the question, whether the plaintiff or the defendant had been in possession of the land prior to the alleged date of dispossession by the defendant, the learned Judge found that the defendant had been in possession.

We were not satisfied with that finding and therefore remanded the case again to the lower appellate Court for a fresh finding as to possession. On the facts found now as to the nature of the property and after perusal of the judgment of the Magistrate in

(1) (1892) 16 Bom. 338.

(2) (1873) 20 W. R. 25 (Civ. Rul.).

a criminal case instituted in 1880, which contained certain statements made by the defendant's father, we are of opinion that the issue as to possession ought to be decided in favour of the plaintiff. The criminal proceedings to which we have referred were instituted by the plaintiff's mother in consequence of the defendant having committed certain wrongful acts upon the plaintiff's property, and pulled down part of the plaintiff's house. On the charge of mischief, the defendant pleaded that he had merely entered upon the house of the plaintiff because it had tumbled down and he had to repair it. But he admitted that he had no interest in the house which belonged to the plaintiff who was separate from him.

Now the house in question stood in a walled compound which contained also the house of the defendant. It appears that the plaintiff's house was not re-built after it had been pulled down in 1880 and the District Judge finds as follows :—

> The house originally belonging to plaintiff and defendant's house originally formed one self-contained property isolated on all sides from other property by boundary-walls. These boundary-walls are not new, though one has been repaired within the last ten years. The position of things is such that any person owning the only residence in the enclosure must make use of the whole enclosure including the property claimed by the plaintiff. To this extent defendant is in possession. He has made no permanent use of it inconsistent with its being the plaintiff's or any one else's land, and therefore had it not been for its isolation and inclusion in defendant's property, I should have been inclined to hold as is so often the case in the country with townlets, that no one was in exclusive possession.

Upon that finding as to the present state of facts and having regard to the statement of the defendant's father to which we have already referred, we have to consider whom the possession of the vacant land must be presumed to have been with, in the absence of direct evidence. Now it is held in the case that the title to this land was in the plaintiff and it is held that the defendant has made no permanent use of it inconsistent with its being the plaintiff's land. That being so a case is made out for the application of the presumption stated by their Lordships of the Privy Council in *Runjeet Ram Panday* v. *Goburdhun Ram Panday*[1], that posses-

(1) (1873) 20 W. R. 25 (Civ. Rul.).

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sion goes with title. No contrary presumption adverse to the plaintiff can, we think, arise from the wrongful acts of the defendant's father in 1880, which were promptly repudiated by him when he was charged in the Magistrate's Court. For, as observed by their Lordships of the Privy Council in *Agency Company* v. *Short*[1] :—"If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner."

Such use as the defendant is held to have made of the vacant ground of the plaintiff since the year 1880 is no evidence of adverse possession : see *Framji Cursetji* v. *Goculdas Madhowji*[2].

We, therefore, reverse the decision of the District Judge and restore that of the Subordinate Judge.

Plaintiff to have costs throughout.

Decree reversed.

G. B. R.

(1) 1888) 13 App. Cas. 793 at p. 798. (2) (1892) 16 Bom. 338.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

BOO FATMA (ORIGINAL DEFENDANT 1), APPELLANT, *v.* BOO GHISANBOO AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 AND 3), RESPONDENTS.*

1909. *July* 26.

Limitation Act (XV of 1877), Schedule II, Article 127—Suit by a Mahomedan daughter to recover her share in her deceased father's property—Limitation.

Article 127, Schedule II of the Limitation Act (XV of 1877) applies to a suit by the daughter of a deceased Mahomedan to recover her share in his property.

Sayad Gulam Hussein v. *Bibi Anvarnisa*(1), followed.

SECOND APPEAL against the decision of N. R. Majmudar, First Class Subordinate Judge of Ahmedabad with Appellate Powers, confirming the decree of M. M. Bhutt, Additional Joint Subordinate Judge of Ahmedabad.

The plaintiff sued to recover separate possession of her five-sixteenth share in the houses in suit by partition, alleging that as the daughter of her deceased father she was entitled to such share according to Mahomedan Law. The plaintiff further alleged that she and the other persons interested in the properties had all along the use and enjoyment of the properties.

Defendant, plaintiff's cousin, contended that the claim was time-barred, that the plaintiff had not the use and enjoyment of the properties as alleged in the plaint and that the plaintiff never got a share in the rents of the houses.

Defendants 2 and 3 were absent though duly served.

The Subordinate Judge found that the suit was in time and that the plaintiff was entitled to one-fourth share in the houses. He passed a decree accordingly.

On appeal by defendant 1 the Appellate Court confirmed the decree. On the point of limitation the Court observed:—

The first point that arises is what Article of the Limitation Act is applicable to the present case. For the plaintiff it is alleged that the appropriate article

* Second Appeal No. 286 of 1908.

(1) P. J. 1885, p. 170.

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is Article 127 of Schedule II. It is unquestionable that so far as this Presidency is concerned the Article in question applies to Mahomedans as well as to Hindus (*Bavasha* v. *Masumsha*, I. L. R. 14 Bom. 70). But as pointed out in (*Molvi Abdul Kadir* v. *Haji Mahomed Ibrahim*, 5 Bom. L. R. 355) to attract the applicability of this Article it is necessary for the plaintiff to show that there had been previous joint possession. She has given evidence herself (exhibit 22) and has also examined five witnesses, Kabir, exhibit 26; Gulab, exhibit 25; Pirbhai, exhibit 27; Chand, exhibit 28 and Fakir, exhibit 29. This evidence shows that the plaintiff, after the death of her husband which took place more than 20 years ago, left her husband's house and came to reside with her cousin Chandbhai and that she left it at the earliest only four years ago.

Defendant 1 preferred a second appeal.

T. R. Desai for the appellant (defendant 1):—The question is what Article of the Limitation Act is applicable, whether Article 123 or 127. The suit was brought by a Mahomedan female to recover her share in the family estate of her grandfather. The estate is in the possession of defendant 1 who is plaintiff's cousin. The plaintiff's father died admittedly 30 years ago. So the suit is *primâ facie* time-barred under Article 123 of the Limitation Act. Article 123 applies because the plaintiff sued to recover a distributive share in the estate of a deceased intestate. Both the lower Courts held that the suit was governed by Article 127 of the Limitation Act and finding that the plaintiff was not excluded from the property to her knowledge over 12 years, they allowed the claim as not time-barred. In coming to that conclusion they have followed the rulings of this High Court: *Sayad Gulam Hussein* v. *Bibi Anvarnisa*[1], *Bavasha* v. *Masumsha*[2], *Abdul Rahim* v. *Kirparam Daji*[3], *Abdul Kadar* v. *Bapubhai*[4].

But the other three High Courts in India have unanimously dissented from the view of this Court. We therefore submit that the question may be referred for consideration to a Full Bench. The other High Courts have held that Article 127 of the Limitation Act does not apply to suits by Mahomedans and that such suits are governed by Article 123. The Full Bench of Allahabad has in *Amme Raham* v. *Zia Ahmad*[5] laid down that the

(1) P. J. 1885, p. 170.
(2) (1889) 14 Bom. 70.
(3) (1891) 16 Bom. 186 at p. 189.
(4) (1898) 23 Bom. 188.
(5) (1890) 13 All. 283.

words "joint family property" cannot cover the property of a Mahomedan family which cannot be said to be a joint family. Those words contemplate the property of a joint family and not joint property of any family. A joint family is unknown to Mahomedan Law. The view of the Allahabad Full Bench is confirmed by the High Court of Madras in *Pateha* v. *Mohidin*(1). The ruling of the Calcutta High Court in *Mahomed Akram Shaha* v. *Anarbi Chowdhrani*(2) adopts the view of the Allahabad and Madras High Courts.

In the Bombay cases the suits were brought by male members. Females cannot claim to occupy the position of males. A Mahomedan female cannot be said to be a member of a joint family.

[SCOTT, C. J.:—The claim in *Sayad Gulam Hussein* v. *Bibi Anvarnisa*(3) was at the instance of a Mahomedan daughter as in the present case.]

That ruling is, no doubt, against our contention and is hard to be distinguished. In a recent decision of this Court an attempt has been made to reconcile the authorities. *Abdul Kadir* v. *Mahomed*(4).

M. N. Mehta for respondent (plaintiff) was not called upon.

SCOTT, C. J.:—The question in this case is whether Article 127 of the Limitation Act applies to a suit by the daughter of a deceased Mahomedan to recover her share in his property. It was decided under the Act of 1877 by an Appellate Bench of this Court in 1885 in *Sayad Gulam Hussein* v. *Bibi Anvarnisa*(3) that it did so apply, and that decision, so far as we are aware, has been followed in Bombay for the last 23 years. It is a decision which is binding upon us and we therefore hold that the suit falls within Article 127. Upon this point, therefore, the judgment of the lower appellate Court is confirmed.

Decree confirmed.

G. B. R.

(1) (1891) 15 Mad. 57.
(2) (1895) 22 Cal. 954.
(3) P. J. 1885, p. 170.
(4) (1903) 5 Bom. L. R. 355.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice.

1909. *August* 5.

MAHIPATI VALAD SHAMLA (ORIGINAL DEFENDANT), APPLICANT, *v.* NATHU VALAD VITHOBA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Civil Procedure Code (Act XIV of 1882), sections 373 and 622—Civil Procedure Code (Act V of 1908), section 115—Redemption suit—Sale really a mortgage—Section 10A(1) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity.

Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the plaintiffs brought a redemption suit alleging that the document, though in the form of a sale-deed, was really a mortgage. The suit was not governed by section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant contended that oral evidence was not admissible to prove that the sale-deed was really a mortgage. After the issues were framed the plaintiffs applied for withdrawal of the suit with liberty to bring a fresh suit on the grounds that the different High Courts held different views as to the admissibility or otherwise of oral evidence and that section 10A of the Dekkhan

* Civil Application No. 53 of 1909 under extraordinary jurisdiction.

(1) Section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) runs as follows :—

10A. Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision.

Provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction.

Provided further that nothing in this section shall be deemed to apply to any suit to which a *bonâ fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit.

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Agriculturists' Relief Act (XVII of 1879) was not applicable. The Court passed an order for the withdrawal of the suit with liberty to bring a fresh suit.

Held, that the Court acted with material irregularity in passing the order.

The Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant.

A plaintiff cannot be allowed to withdraw a suit in order that he may wait and see if the law is not altered at some future date in such a way as to enable him to obtain a decree against the defendant who is ready for trial and prepared to resist the claim and certain of success on the law in force.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the order dated the 12th December 1908 passed by A. R. Gupte, Second Class Subordinate Judge of Sirpur in the Khándesh District, in original Suit No. 444 of 1908.

The plaintiffs sued to redeem the lands in dispute under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) alleging that the document sued on was in the form of a sale-deed but in reality it was a mortgage.

The defendant contended that the plaintiffs were not entitled to adduce oral evidence to prove that the transaction was a mortgage.

After the issues were framed and before the Court proceeded with the trial the plaintiffs presented an application for the withdrawal of the suit with liberty to file a fresh suit on the ground that they would suffer serious loss if they continued the suit inasmuch as the views of the different High Courts in India were different with respect to the admissibility of oral evidence in such cases, and section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not made applicable to the Khándesh District.

The Subordinate Judge granted the plaintiffs' application and allowed the suit to be withdrawn with liberty to bring a fresh suit.

The defendant thereupon applied under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of

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1908) urging that the Subordinate Judge, in granting the plaintiffs' application, exceeded the jurisdiction vested in him by law. A *rule nisi* was issued requiring the plaintiffs to show cause why the order of the Subordinate Judge should not be set aside.

K. H. Kelkar appeared for the applicant (defendant) in support of the rule:—Section 373 of the Civil Procedure Code does not empower the Court to pass an order for the withdrawal of a suit like the present. The plaintiff launched the proceedings and he must proceed with the suit and cannot now retire with the object of taking advantage of a provision of law which was not in existence when the suit was filed and which he expects to come into force hereafter: *Watson* v. *The Collector of Rajshahye*[1], *Prabhakar* v. *Khanderao*[2].

P. B. Shingne appeared for the opponents (plaintiffs) to show cause:—The decision in *Prabhakar* v. *Khanderao*[2] contemplates withdrawal of a suit with the intention of taking advantage of a substantial provision of law newly enacted. While in the present case we want to take advantage of section 10A of the Dekkhan Agriculturists' Relief Act which is a provision of adjective law. Section 373 of the Civil Procedure Code is broad enough to cover a case like the present: *Misser Debee Pershad* v. *Buldeo Pershad*[3], *Koomar Poresh Narain Roy* v. *Ranee Surut Soonduree Debee*[4], *Mussamut Khatoon Koonwar* v. *Baboo Hurdoot Narain Singh*[5].

The case falls under section 622 of the Civil Procedure Code, therefore, it will not be in consonance with the provisions of that section to interfere in a case of this kind.

SCOTT, C. J.:—The plaintiffs filed this suit for redemption alleging that the document which had been passed by them in favour of the defendant in the form of a sale-deed was really a mortgage.

(1) (1869) 13 Moo. I. A. 160.
(2) (1908) 10 Bom. L. R. 625.
(3) (1873) 5 N. W. P. R. 116.
(4) (1871) 16 W. R. 100 (Civ. Rul.).
(5) (1873) 20 W. R. 163 (Civ. Rul.).

The defendant disputed this allegation and contended that evidence was not admissible for the purpose of proving that the sale-deed was really a mortgage.

Issues were raised and the further hearing was fixed for a certain date. After the raising of the issues but before the hearing, the plaintiff put in the following application :—" This is a suit for redemption : plaintiff and defendant had entered into a mortgage transaction and the defendant has taken from the plaintiff a mortgage in the form of a sale-deed. We have got evidence to show that the sale-deed is really a mortgage. The defendant has now given a petition contending that oral evidence is inadmissible though he did not say so in the written statement. The different High Courts have taken different views as to whether oral evidence was admissible or not. Further, section 10A of the Dekkhan Agriculturists' Relief Act states that oral evidence is admissible. The third part of the Dekkhan Agriculturists' Relief Act has been applied to this district. But section 10A is not included in it. Therefore the point in dispute is whether oral evidence is admissible or not. In such a state of things if this suit is further prosecuted, plaintiff is likely to suffer loss. Therefore the plaintiff should be permitted to withdraw this suit and then to bring a fresh suit."

The application was in effect a confession that upon the law as it then stood the plaintiffs would not be able to give evidence which would entitle them to succeed.

Notwithstanding the protest of the defendant the Subordinate Judge granted permission to the plaintiffs to withdraw the suit with liberty to file a fresh suit hereafter.

The defendant feeling aggrieved by that order has applied to this Court under section 115 of the Civil Procedure Code of 1908 for revision, on the ground that the lower Court has acted without jurisdiction or with material irregularity in the exercise of its jurisdiction. Section 373 of the Civil Procedure Code of 1882 under which the order of the Subordinate Judge was passed provides that " If, at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff that the

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suit must fail by reason of some formal defect or that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit."

In the case of *Muddun Ram Doss* v. *Israil Ali Chowdhry*[1], Mr. Justice Kemp of the Bengal High Court held upon the words of section 97 of the Civil Procedure Code of 1859 which provided that the Court on being satisfied that there was sufficient ground for permitting the plaintiff to withdraw the suit, might grant permission, that such a permission should not be granted except in cases where the suit had failed by reason of some formal defect, following the decision of the Judicial Committee in *Watson* v. *The Collector of Rajshahye*[2].

The words of the Code of 1882 are different from the words construed in that case by Mr. Justice Kemp, for, the Court is authorized to permit withdrawal not only where the suit must fail by reason of some formal defect but also where there are sufficient grounds for permitting the plaintiff to withdraw.

It is impossible to lay down any exhaustive definition of what are sufficient grounds within the meaning of section 373 but I think that the Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant. The power of the Court in India appears to me under the Civil Procedure Code to be no greater than the power of the Court in England under Order XXVI, Rule 1. With regard to that Rule Lord Halsbury in delivering the Judgment of the House of Lords in *Fox* v. *Star Newspaper Company*[3], said "The substance (of the new procedure) is that when it once comes into Court, and when the plaintiff offers no support to his action, there must be a verdict for the defendant." That, as I have pointed out, is in effect the situation here. The plaintiffs by their application confess upon

(1) (1874) 21 W. R. 291 (Civ. Rul.). (2) (1863) 13 Moo. I. A. 160.
(3) [1900] App Cas. 19.

the law as it now stands that they cannot give any evidence which would enable them to obtain a decree yet they have obtained permission to withdraw their suit in order that they may wait and see if the law is not altered at some future date in such a way as to enable them to obtain a decree against the defendant who is now ready for trial and prepared to resist the claim and certain of success on the law now in force.

It seems to me that in the circumstances of this case the Subordinate Judge acted with material irregularity in passing the order which he did, and I therefore set it aside with costs.

Order set aside

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ACCOUNT—*Decree—No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree—Appeal against such an order—Practice.*] A decree of the High Court on the Original Side contemplated an account being taken between the parties but it was silent on the question as to how that account was to be taken, whether by the Commissioner or by some person selected by both the parties. The Court of first instance decided that where a direction as to account ought to have been incorporated in a decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken.

Held, on appeal, that as some account was taken under the decree by a person appointed jointly by the parties, a new agreement had come into existence superseding the decree, and the Court was not competent to make the order appealed against.

SIR JEHANGIR COWASJI *v.* THE HOPE MILLS, LIMITED ... (1908) 33 Bom. 216

ACKNOWLEDGMENT—*Sale-deed containing acknowledgment of receipt of consideration money in full—Vendor's lien for unpaid purchase-money—Mortgagee taking the mortgage without notice of unpaid purchase-money—Transfer of Property Act* (*IV of* 1882), *sec.* 55, *cl.* (4) (*b*), *cl.* (6)—*Estoppel—Evidence Act* (*I of* 1872), *sec.* 115.

See TRANSFER OF PROPERTY ACT 53

ACTS:—

1846—I, SEC. 7.

See PRACTICE 256

1856—XV, SECS. 2, 3, 4, 5.

See HINDU LAW 107

1859—XIII.

See WORKMAN'S BREACH OF CONTRACT ACT 25

——— SECS. 1, 2.

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1860—XLV, SECS. 21, 186.

See PENAL CODE 213

———SECS. 124A, 153A.

See CRIMINAL PROCEDURE CODE 77

1864—II, SECS. 8 AND 9.

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ACTS—*continued.*

1866—XXVIII, SEC. 34.

See CHARITABLE TRUSTS 509

1869—XIV, SEC. 16.

See BOMBAY CIVIL COURTS ACT 371

1870—VII, SEC. 7, CL. (IV) (*b*) AND CL. (V).

See COURT FEES ACT 658

——SEC. 31.

See WORKMAN'S BREACH OF CONTRACT ACT 22

1872—I, SEC. 115.

See TRANSFER OF PROPERTY ACT 53

—— IX, SECS. 2 (*g*) (*h*), 20—35, 65.

See CONTRACT ACT 411

1877—XV, SCH. II, ART. 127.

See LIMITATION ACT 719

—— ART. 179.

See HINDU LAW 39

1878—VIII, SEC. 19.

See BOMBAY ABKARI ACT 380

1879—XVII, SEC. 2.

See DEKKHAN AGRICULTURISTS' RELIEF ACT 376, 504

—— SEC. 7.

See DEKKHAN AGRICULTURISTS' RELIEF ACT 249

—— SEC. 10A.

See DEKKHAN AGRICULTURISTS' RELIEF ACT 722

—— SEC. 63 (A).

See TRANSFER OF PROPERTY ACT 44

1882—II, SECS. 1, 2.

See CHARITABLE TRUSTS 509

—— SEC. 34.

See TRUSTS ACT 429

—— SEC. 84.

See CONTRACT ACT 11

—— IV, SEC. 50.

See TRANSFER OF PROPERTY ACT 96

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ACTS—*continued.*

1882—IV, SEC. 55, CL. (4) (*b*), (6).

See TRANSFER OF PROPERTY ACT 53

——— SEC. 59.

See TRANSFER OF PROPERTY ACT 44

——— SEC. 93.

See DECREE 273

——— II, SEC. 107.

See TRANSFER OF PROPERTY ACT 610

——— XIV, SEC. 11.

See CIVIL PROCEDURE CODE 278

——— SEC. 13.

See CIVIL PROCEDURE CODE 479

——— SEC. 28.

See CIVIL PROCEDURE CODE 293

——— SECS. 102, 103, 117.

See CIVIL PROCEDURE CODE 475

——— SECS. 234, 244, 252.

See HINDU LAW 30

——— SEC. 244.

See CIVIL PROCEDURE CODE 278

——— SECS. 244, 310A, 311.

See CIVIL PROCEDURE CODE 698

——— SEC. 276.

See HINDU LAW 264

——— SECS. 278, 282, 283 AND 287.

See CIVIL PROCEDURE CODE 311

——— SECS. 320, 323.

See GUJARAT TALUKDARS' ACT 443

——— SECS. 373 AND 622.

See CIVIL PROCEDURE CODE 722

——— SEC. 375.

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1882—XIV, SEC. 539.

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——— XV, SEC. 69.

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1887—VII, SEC. 8.

See SUITS VALUATION ACT 307, 658

1890—VIII, SEC. 41.

See GUARDIANS AND WARDS ACT 419

——— IX, SEC. 75, SCH. II, CL. (*l*).

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——— SEC. 18.

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1898—V, SEC. 106 (3).

See CRIMINAL PROCEDURE CODE 33

——— SECS. 225, 233, 234, 235, 236 AND 237.

See CRIMINAL PROCEDURE CODE 77

——— SECS. 233, 234, 235, 236, 237 AND 239.

See CRIMINAL PROCEDURE CODE 221

——— SEC. 269.

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1899—II, SEC. 2 (5) (*b*).

See STAMP ACT 426

1908—V, SEC. 9.

See CIVIL PROCEDURE CODE 387

——— O. VI, *r.* 17.

See CIVIL PROCEDURE CODE 644

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ACTS (BOMBAY) :—

1827—II, SEC. 56.

See PLEADER 252

1862—V, SEC. 3.

See BHAGDARI ACT 116

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1878—V, SECS. 3 (10), 9, 43.

See BOMBAY ABKARI ACT... 380

1887—VII, SEC. 5.

See TODA GIRAS ALLOWANCE ACT 258

1888—III, SEC. 354.

See BOMBAY MUNICIPAL ACT 534

——— VI, SEC. 31.

See GUJARAT TALUKDARS' ACT 443

1890—II, SECS. 11, 47.

See SALT ACT 636

1898—IV.

See BOMBAY CITY IMPROVEMENT ACT 483

1901—III.

See MUNICIPALITY 213

1905—II.

See GUJARAT TALUKDARS' ACT 443

ADEN COURTS ACT (II OF 1864), SECS. 8 AND 9—*Presidency Small Cause Courts Act (XV of 1882), sec. 69—Resident's Court—Application to state a case to the High Court—Application unconditional before delivery of judgment.*] A party requiring a case to be stated by the Resident at Aden to the High Court of Bombay, under section 8 of the Aden Courts Act (II of 1864) should make an unconditional application to him in that behalf before judgment is delivered.

Ralli Brothers v. *Goculbhai Mulchand* (1890) 15 Bom. 376 and *Bank of Bengal* v. *Vyabhoy Gangji* (1891) 16 Bom. 618, applied.

Section 9 of the Aden Courts Act (II of 1864) gives the Resident the same option of either reserving his judgment or delivering it contingent on the opinion of the High Court as section 69 of the Presidency Small Cause Courts Act (XV of 1882) gives to the Presidency Small Cause Court.

BHAGAVANDAS DHARAMSI v. A. BESSE FRENCHMAN ... (1909) 33 Bom. 708

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ADMINISTRATION SUIT—*Indian Trusts Act (II of 1882), sec. 34—Executor—Trustee—Advice of Court as to administration of property—Executor continuing as such.*] So long as an executor occupies that position, he cannot claim the advantages provided for trustees by section 34 of the Indian Trusts Act (II of 1882). If he feels any doubt as to the manner in which he should administer the estate come to his hands, his remedy is to file an administration suit.

TRIMBAK MAHADEV *v.* NARAYAN HARI ... ... (1909) 33 Bom. 429

———*Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of 1882), sec. 375—Adjustment of suits, what is—Written submission necessary*]. The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Assistant Commissioner for taking accounts, and a large mass of accounts, objections and surcharges were filed by the various parties. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him. The 1st and 6th defendants with their attorney were present at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained to the 1st and 6th defendants in turn his proposal and told them that whatever award he made would be binding on them. To this they agreed, the 1st defendant even saying he would take one rupee if that was the sum awarded to him. It was also agreed that the Assistant Commissioner should draw up his findings in the form of a consent decree to be taken by the parties as that would save the parties a large sum in costs. At another meeting before the Assistant Commissioner the latter recorded his findings and then proceeded to draw up the consent decree embodying these findings therein but the defendants 1 and 6 refused to be bound by his decision. Upon application being made by the plaintiff that an adjustment of the suit might be recorded under section 375 of the Civil Procedure Code on the basis of the Assistant Commissioner's decision,

Held, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by section 4 of the Indian Arbitration Act, and, consequently, there had been no legal and vaild reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation, and could therefore have no legal consequences. As there had been no reference to arbitration and no award there could be no adjustment to give effect to under section 375 of the Civil Procedure Code.

Samibai v. *Premji Pragji* (1895) 20 Bom. 304 and *Pragdas* v. *Girdhardas* (1901) 26 Bom. 76, considered and distinguished.

RUKHANBAI *v.* ADAMJI SHAIK RAJBHAI ... ... (1908) 33 Bom 69

ADOPTION—*Gift of a son by first husband in adoption by a Hindu widow after her re-marriage—Hindu Widow Re-marriage Act (XV of 1856), secs. 2, 3, 4 and 5.*] According to the texts the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Assuming that the mother has by Hindu Law a right to give her son in adoption the Hindu Widow Re-marriage Act (XV of 1856) does not afford any indication that the legislature intended to deprive her of it.

The right of guardianship, which under the provisions of Act XV of 1856, section 3, may, under certain conditions, be transferred from the mother to one

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of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

Panchappa v. *Sanganbasawa* (1899) 24 Bom. 89, considered.

PUTLABAI *v.* MAHADU ... ... (1908) 33 Bom. 107

ADOPTION—*Hindu Law—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation.*] Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage.

Thus, if a widow, before the adoption, severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

Lakshman v. *Radhabai* (1887) 11 Bom. 609 and *Moro* v. *Balaji* (1894) 19 Bom. 809, followed. *Sreeramulu* v. *Kristamma* (1902) 26 Mad. 143, not followed.

RAMAKRISHNA *v.* TRIPURABAI ... ... (1908) 33 Bom. 88

———*Hindu law—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth*] When a married Hindu having a son is given in adoption, the son does not like his father lose the *gotra* and rights of inheritance in the family of his birth and does not acquire the *gotra* and a right of succession to the property of the family into which his father is adopted.

In the absence of any special custom, Jains are governed by the ordinary Hindu law.

KALGAVDA TAVANAPPA *v.* SOMAPPA TAMANGAVDA ... (1909) 33 Bom. 669

———*Succession to the adopted son—Adoptive mother entitled to succeed in preference to the adoptive father to a son taken in adoption—Mitakshara—Hindu Law.*

See HINDU LAW 404

ADVERSE POSSESSION—*Adverse possession between tenants-in-common—What constitutes adverse possession—Acts of exclusive possession—Ouster.*] The property in dispute belonged jointly to two brothers G. and D. The plaintiffs obtained a decree on a mortgage-bond against D. as manager of the family, and in execution of the decree the property was sold to V. When V. sought to take possession of the property he was obstructed by G. and he had to file a suit against G. to remove the obstruction. In that suit it was held on the 29th November 1886 that V. was entitled to recover possession by partition of a moiety of the property. The application to execute this decree was sent to the Collector who on the 11th of December 1895 effected the partition and made over symbolical possession to V. of his share. This share was sold to plaintiff on the 18th March 1898. Meanwhile, on the 4th October 1894, G. sold the whole of the property to defendant's father. The plaintiff eventually sued on the 4th October 1906, to recover possession of the property from defendant: the latter contended that the claim was barred by adverse possession,

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Held, that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than 12 years before the date of the present suit) the period of his vendor G.'s possession, it must be shown that the latter's possession was also adverse. That it could not be, so long as the decree for partition was alive and capable of execution as against G. during the period of his exclusive possession, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other.

The question of adverse possession as between tenants-in-common depends not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other.

AMBITA RAVJI *v.* SHRIDHAR NARAYAN ... ... (1908) 33 Bom. 317

ADVERSE POSSESSION—*Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title.*

See OWNERSHIP 712

AGREEMENT—*Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Difference between agreement and contract—Indian Trusts Act (II of* 1882), *sec.* 84—*Indian Contract Act (IX of* 1872), *secs. 2 (g), (h),* 20—35, 65.

See CONTRACT ACT 411

———————*Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document—Stamp Act (II of* 1899), *sec.* 2 (5) (*b*).

See STAMP ACT 426

AGRICULTURIST—*A person who is an agriculturist in* 1871 *but is not one when the suit is brought in* 1905 *cannot claim the benifit of the Act—Dekkhan Agriculturists' Relief Act (XVII of* 1879), *sec.* 2.

See DEKKHAN AGRICULTURISTS' RELIEF ACT 504

ALIENATION—*Bhag—Unrecognized sub-division of a bhag—Suit to set aside alienation—Limitation—Bhagdari Act (Bom. Act V of* 1862), *sec.* 3.

See BHAGDARI ACT 116

———————*Hindu Law—Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation.*

See HINDU LAW 88

AMENDMENT OF PLEADINGS—*Defence of the bar of limitation—Practice as to amendment of plaint—Civil Procedure Code (Act V of* 1908), *O. VI, r.* 17.

See CIVIL PROCEDURE CODE 644

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APPEAL—*Assistant Judge hearing a claim—Value of the claim under Rs.* 5,000—*Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure—Land Acquisition Act* (*I of* 1894)—*Bombay Civil Courts Act* (*XIV of* 1869), *sec.* 16.] Where a claim under the provisions of the Land Acquisition Act, 1894, is heard by the Assistant Judge and the amount in dispute does not exceed Rs. 5,000 in value, the appeal lies to the District Court and not to the High Court.

Laxmi v. *Aba* (1908) 32 Bom. 634, followed.

RANCHHODBHAI *v.* COLLECTOR OF KAIRA ... ... (1909) 33 Bom. 371

———*Civil Procedure Code* (*Act XIV of* 1882), *secs.* 244, 310*A*, 311—*Decree—Execution—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under sec.* 310*A when they also fall under sec.* 244, *Civil Procedure Code*, 1882.] Within a month of the sale at a Court auction, the judgment-debtor applied to the Court to set aside the sale on the ground that owing to conspiracy among the villagers (including the decree-holder) the sale was at an undervalue. A week later, but within the month allowed, he again applied to the Court to set aside the sale under section 310A of the Civil Procedure Code (Act XIV of 1882), depositing the amount as required by the section. The Subordinate Judge rejected the second application on the ground that it did not lie as the judgment-debtor had already applied to set aside the sale on the ground of irregularity under section 311 of the Code. This order was on appeal reversed by the District Judge. On appeal to the High Court, it was contended, first, that the order passed by the Subordinate Judge was not appealable; and, second, that the second application could not be granted because the judgment-debtor had already applied to set aside the sale under section 311 of the Code.

Held, (1) that the order passed by the Subordinate Judge was appealable.

Pita v. *Chunilal* (1906) 31 Bom. 207, followed.

(2) that the allegation in the first application being that the sale had been brought about by the fraud of the residents of the village where the lands were situate and where the decree-holder resided, the application must be regarded as an application under section 244 and not under section 311 of the Code of Civil Procedure of 1882.

Decree of the District Judge confirmed.

Golam Ahad Chowdhry v. *Judhister Chundra Shaha* (1902) 30 Cal. 142, followed.

HARIHAR KANTA *v.* RAMA PANDU ... ... (1909) 33 Bom. 698

———*Civil Procedure Code* (*Act XIV of* 1882), *secs.* 503, 505 *and* 588—*Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge.*] A Subordinate Judge recommended to the District Judge that a certain person be appointed receiver and in case of the recommendation not being accepted, the Nazir of his Court should be appointed. The District Judge refused to authorize the Subordinate Judge to appoint either of the persons so recommended.

Against the order of the District Judge an appeal was preferred to the High Court.

Held, that no appeal lay. The District Judge's order was passed under section 505 of the Civil Procedure Code (Act XIV of 1882) and not under section 503. It was therefore an order which was not appealable not being specified in the list of orders in section 588.

Birajan Kooer v. *Ram Churn Lall Mahata* (1881) 7 Cal. 719, followed.

BAI MANI *v.* KHIMCHAND ... . (1908) 33 Bom. 104

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APPEAL—*Decree—No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree.*] An appeal lies against an order of a Judge sitting on the Original Side if that order decides a question of some right between the parties.

SIR JEHANGIR COWASJI *v.* THE HOPE MILLS, LIMITED ... (1908) 33 Bom. 216

———*Making a new case.*

See PRACTICE 35

———*Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), secs. 234, 244, 252—Limitation Act (XV of 1877), sch. II, art. 179.*] Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties.

SHIVRAM *v.* SAKHARAM ... ... (1908) 33 Bom. 89

———*Small Cause suit—Suit brought in the Court of First Class Subordinate Judge having Small Cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge who had no small cause powers—Registering the suit as a regular suit—Trial of the suit by the First Class Subordinate Judge as a regular suit—Suit remains a small cause.*

See SMALL CAUSE SUIT 664

APPEAL COURT—*Criminal jurisdiction—Order to furnish security—Criminal Procedure Code (Act V of 1898), sec. 106 (3).*

See CRIMINAL PROCEDURE CODE 33

APPEAL IN PROBATE PROCEEDINGS—*Pleader's fees—Taxation—Scale of costs—Act I of 1846, sec. 7—Practice.*

See PRACTICE 256

APPEAL PENDING FROM ORDER—*Contempt of Court—Notice of motion for committal—Service of notice—Stay of proceedings.*

See CONTEMPT OF COURT 630

ARBITRATION—*Award—Suit to file an award—Want of jurisdiction in the arbitrators can be pleaded—Award is equivalent to a judgment even before a decree is passed upon the award—Partition is effected by the award itself.*] When a suit is brought to enforce an award a party to it can urge and show that it is not binding upon him on the ground of want of jurisdiction in the arbitrators.

An award is equivalent to a judgment whether it has passed into a decree or not. It is binding upon the parties. In cases where it directs partition to be effected, it dissolves the joint family and from the moment of its date it severs their joint interests.

Muhammad Newaz Khan v. *Alum Khan* (1891) 18 Cal. 414 and *Laldas* v. *Bai Lala* (1908) 11 Bom. L. R. 20, followed.

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ARBITRATION—*Suit for administration—Reference to Commissoner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of* 1882), *sec.* 375—*Adjustment of suit, what is—Written submission necessary.*

See ADMINISTRATION SUIT 69

ASSESSORS—*Trial by jury—Trial with the aid of assessors—Difference in the mode of trial—Accused if prejudiced can complain—Practice—Procedure—Criminal Procedure Code (Act V of* 1893), *sec.* 269.

See CRIMINAL PROCEDURE CODE 423

ASSIGNMENT—*Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose"—Transfer of Property Act (IV of* 1882), *sec.* 107—*Lien—charge.*

See LEASE 610

———————*Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary—Transfer of Property Act (IV of* 1882), *sec.* 50.

See TRANSFER OF PROPERTY ACT 96

ATTACHMENT—*Debts—Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Civil Procedure Code (Act XIV of* 1882), *sec.* 276—*Hindu Law.*

See HINDU LAW 264

———————*Money decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtor—Civil Procedure Code (Act XIV of* 1882), *secs.* 278, 282, 283 and 287.

See CIVIL PROCEDURE CODE 311

———————*Toda Giras Allowance—Attachment and sale of in execution of a decree—"Money likely to become due," interpretation of—How far can the allowance be attached and sold—Toda Giras Allowance Act (Bom. Act VII of* 1887), *sec.* 5.

See TODA GIRAS ALLOWANCE ACT 253

ATTESTATION—*Transfer of Property Act (IV of* 1882), *sec.* 59—*Dekkhan Agriculturists' Relief Act (XVII of* 1879), *sec.* 63 (A)—*Mortgage-deed—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him.*] A deed of mortgage was signed by the Sub-Registrar who was bound to attest it under the provisions of section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and the writer of the deed in concluding the writing of the body of the document stated that it was written by him. The deed was not attested by two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882).

Held, that neither the signature of the Sub-Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage.

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An attesting witness is a "witness who has seen the deed executed and who signs it as a witness."

Burdett v. *Spilsbury* (1843) 10 C. & F. 340, followed.

RANU *v.* LAXMANRAO ... ... (1908) 33 Bom. 44

ATTORNEY'S COSTS—*Petition—Taxing Master—High Court Rules, Rule* 544—*Solicitors' retainer denied—Taxation of costs.*] An attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill.

In re Jones (1887) 36 Ch. D. 105, followed.

In re MADHAVJI ... ... (1908) 33 Bom. 667

AUCTION-PURCHASER—*Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtor—Civil Procedure Code (Act XIV of* 1882), *secs.* 278, 282, 283 *and* 287.

See CIVIL PROCEDURE CODE 311

AWARD—*Arbitration—Suit to file an award—Want of jurisdiction in the arbitrators can be pleaded—Award is equivalent to a judgment even before a decree is passed upon the award—Partition is effected by the award itself.*] When a suit is brought to enforce an award a party to it can urge and show that it is not binding upon him on the ground of want of jurisdiction in the arbitrators.

An award is equivalent to a judgment whether it has passed into a decree or not. It is binding upon the parties. In cases where it directs partition to be effected, it dissolves the joint family and from the moment of its date it severs their joint interests.

Muhammad Newaz Khan v. *Alam Khan* (1891) 18 Cal. 414 and *Laldas* v. *Bai Lala* (1908) 11 Bom. L. R. 20, followed.

BHAURAO *v.* RADHABAI ... ... (1909) 33 Bom. 401

———*Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of* 1882), *sec.* 375—*Adjustment of suits, what is—Written submission necessary.*

See ADMINISTRATION SUIT 69

BATTA—*Defendant summoned for examination—Dekkhan Agriculturists' Relief Act (XVII of* 1879), *sec.* 7.

See DEKKHAN AGRICULTURISTS' RELIEF ACT 249

BHAG—*Unrecognized sub-division of a bhag—Alienation—Suit to set aside the alienation—Limitation—Bhagdari Act (Bom. Act V of* 1862), *sec.* 3.

See BHAGDARI ACT 116

BHAGDARI AND NARWADARI TENURES ACT (BOM. ACT V OF 1862), SEC. 3—*Bhag—Unrecognised sub-division of a bhag—Alienation—Suit to set aside the alienation—Limitation.*] Possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act (Bom. Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest.

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The Bhagdari Act (Bom. Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

Dala v. *Parag* (1902) 4 Bom. L. R. 797 and *Jethabhai* v. *Nathalbhai* (1904) 28 Bom. 399, distinguished.

ADAM UMAR *v.* BAPU BAWAJI ... ... (1908) 33 Bom. 116

BHAGDARI AND NARWADARI TENURES ACT (BOM. ACT V OF 1862), SEC. 3—*Plea of res judicata can prevail even where its effect is to sanction what is illegal—Res judicata—Civil Procedure Code* (*Act XIV of* 1882), *sec.* 13.

See CIVIL PROCEDURE CODE 479

BOMBAY ABKARI ACT (BOM. ACT V OF 1878), SECS. 3 (10), 9, 43—*Cocaine—Import by sea into the Bombay Harbour—"Import," meaning of—Sea Customs Act* (*VIII of* 1878), *sec.* 19.] Section 9 of the Bombay Abkari Act (Bombay Act V of 1879) does not prohibit importing cocaine generally; it merely prohibits its importation unless duty has been paid.

The intention and requirement of the section in the case of articles liable to duty under the Tariff Act are that the duty shall be paid. That intention and requirement can only be contravened when reasonable opportunity to pay the duty has been afforded and has been evaded.

The mere entry into the Bombay harbour of a ship conveying dutiable goods or merely tying it up against the dock wall is not importing goods in contravention of the obligation to pay duty.

The term "import" as used in the Bombay Abkâri Act, 1879, includes the conveying into any part of the Presidency of Bombay by sea.

EMPEROR *v.* DE SYLVA ... ... (1909) 33 Bom. 380

———CITY IMPROVEMENT ACT (BOM. ACT IV OF 1898)—*Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references—Land Acquisition Act* (*I of* 1894), *sec.* 23.

See LAND ACQUISITION ACT 483

———CIVIL COURTS ACT (XIV OF 1869), SEC. 16—*Land Acquisition Act* (*I of* 1894)—*Assistant Judge hearing a claim—Value of the claim under Rs.* 5,000 *—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure.*] Where a claim under the provisions of the Land Acquisition Act, 1894, is heard by the Assistant Judge and the amount in dispute does not exceed Rs. 5,000 in value, the appeal lies to the District Court and not to the High Court.

Laxmi v. *Aba* (1908) 32 Bom. 634, followed.

RANCHHODBHAI *v.* COLLECTOR OF KAIRA ... ... (1909) 33 Bom. 371

———DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901)—*Clerk in the cess collection department of a District Municipality—Public Servant—Obstruction to a public servant—Penal Code* (*Act XLV of* 1860), *secs.* 21, 186.

See PENAL CODE 213

———MUNICIPAL ACT (BOM. ACT III OF 1888), SEC. 354—*Construction—Municipal Commissioner—Power to remove dangerous structure—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house.*] The primary object of section 354 of the City of Bombay Muni-

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cipal Act (Bom. Act III of 1888), is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the right of individuals.

The word 'appear' in the section does not involve 'appear to the eye.' It is sufficient if it appears to the Commissioner on the representation of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial, so that he must exercise his discretion in determining what action should be taken. It is not sufficient that he should merely sign a notice which was sent to him by the Executive Engineer because it has previously been signed by that officer. It should be considered as a notice to show cause. It is not invalid, at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right.

Danger means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first, the degree of danger must be ascertained, and then the appropriate precautionary measure prescribed. Where it is not suggested that the danger is imminent, a duty is imposed on the Commissioner to decide judicially what should be done to assure the safety of the public having due regard to the interest of the owner of the structure.

The discretion must not be arbitrary: *Paskall* v. *Passmore* 15 Pa. St. D. 304; *Gangjibhoy* v. *The Municipal Corporation of Bombay* (1899) 1 Bom. L. R. 754 at p. 764. But the Court is in the first instance entitled to inquire whether the discretion has been exercised. Discretion has to be exercised, first, in coming to the conclusion as to the state of the structure, and, then in fixing upon the appropriate remedy. It is sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued, based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken.

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *primâ facie* evidence that the person appointed by the Commissioner has not exercised his discretion. The Commissioner can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains.

Under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but where there is no suggestion of imminent danger, the person affected is entitled to be heard as a matter of common justice.

LALBHAI v. MUNICIPAL COMMISSIONER OF BOMBAY ... (1908) 33 Bom. 334

BOMBAY REGULATION II OF 1827, SEC. 56—*Pleader—Misbehaviour—Suspension of Sunad—High Court's disciplinary jurisdiction.*] Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice gives them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt.

A pleader, who presides at a public meeting and therein procures the passing of a resolution contemptuously denouncing or protesting against the conduct of a

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High Court Judge in passing sentence at a trial at the Criminal Sessions, is guilty of misbehaviour (under section 56 of Regulation II of 1827).

GOVERNMENT PLEADER *v.* JAGANNATH ... (1908) 33 Bom. 252

CASE STATED—*Resident's Court—Application to state a case to the High Court—Application unconditional before delivery of judgment—Aden Courts Act (II of 1864), secs. 8 and 9.*

See ADEN COURTS ACT 708

CASES:—

Agency Company v. *Short* (1888) 13 App. Cas. 793, followed.

See OWNERSHIP 712

Ajudhia Pershad v. *Baldeo Singh* (1894) 21 Cal. 818, followed.

See DECREE 273

Bai Shirinbai v. *Kharshedji* (1896) 22 Bom. 430, followed.

See CHARITABLE TRUSTS 509

Bank of Bengal v. *Vyakhoy Gangji* (1891) 16 Bom. 618, applied.

See ADEN COURTS ACT 708

Birajan Kooer v. *Ram Churn Lall Mahata* (1881) 7 Cal. 719, followed.

See CIVIL PROCEDURE CODE 104

Borough of Bathurst v. *Macpherson* (1879) 4 App. Cas. 256, followed.

See NEGLIGENCE 393

Boyter v. *Dodsworth* (1796) 6 T. R. 681, followed.

See CIVIL PROCEDURE CODE 278

Burdett v. *Spilsbury* (1843) 10 C. & F. 340, followed.

See TRANSFER OF PROPERTY ACT 44

Carew, ex parte [1897] A. C. 719, followed.

See CRIMINAL PROCEDURE CODE 221

Collector of Belgaum v. *Bhimrao* (1908) 10 Bom. L. R. 657, followed.

See LAND ACQUISITION ACT 483

Collector of Thána v. *Hari Sitaram* (1882) 6 Bom. 546, followed.

See JURISDICTION 373

Cornish v. *Abington* (1859) 4 H. & N. 549, referred to.

See LEASE 610

Dula v. *Parag* (1902) 4 Bom. L. R. 797, distinguished.

See BHAGDARI ACT 116

Dayaram v. *Gordhandas* (1903) 31 Bom. 73, distinguished.

See SUITS VALUATION ACT 307

Dinizulu v. *Attorney-General of Zululand* (1889) 61 L. T. 740, followed.

See CRIMINAL PROCEDURE CODE 221

Dorasami Naidu v. *Emperor* (1906) 30 Mad. 1 , referred to.

See CRIMINAL PROCEDURE CODE 33

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CASES—*continued.*

Dwarkojirav Baburav v. *Balkrishna Bhalchandra* (1894) 19 Bom. 255, explained.
See DEKKHAN AGRICULTURISTS' RELIEF ACT 376

Emperor v. *Dhondu Krishna* (1904) 33 Bom. 22, followed.
See WORKMAN'S BREACH OF CONTRACT ACT 25

Fakirgauda v. *Gangi* (1896) 22 Bom. 277, followed.
See HINDU LAW 693

Framji Cursetji v. *Goculdas Madhowji* (1892) 16 Bom. 338, referred to.
See OWNERSHIP 712

Gangjibhoy v. *The Municipal Corporation of Bombay* (1892) 1 Bom L. R. 754, referred to.
See BOMBAY MUNICIPAL ACT 335

Golam Ahad Chowdhry v. *Judhister Chundra Shaha* (1902) 30 Cal. 142, followed.
See CIVIL PROCEDURE CODE 638

Gordon v. *Gordon* [1904] P. 163, followed.
See CONTEMPT OF COURT 630

Hari Sanker Dutt v. *Kali Kumar Patra* (1905) 32 Cal. 734, followed.
See SUITS VALUATION ACT 307

Inderun Valungypooly Tayer v. *Ramasawmy Pandia Talaver* (1869) 13 Moo. I. A. 141, followed.
See HINDU LAW 693

Ishan Chunder Haxra v. *Rameswar Mondol* (1897) 24 Cal. 831, approved.
See CIVIL PROCEDURE CODE 293

Jairamdas v. *Zamonlal* (1903) 27 Bom. 357, not followed.
See JURISDICTION 469

Jethabhai v. *Nathabhai* (1904) 28 Bom. 399, distinguished.
See BHAGDARI ACT 116

Jones, In re (1887) 36 Ch. D. 105, followed.
See CIVIL PROCEDURE CODE 667

Kachar Bhoj Vaija v. *Bai Rathore* (1883) 7 Bom. 289, distinguished.
See CIVIL PROCEDURE CODE 293

Keshav v. *Vinayak* (1897) 23 Bom. 22, applied.
See JURISDICTION 373

Lakshman v. *Radhabai* (1887) 11 Bom. 609, followed.
See HINDU LAW 83

Laldas v. *Bai Lala* (1908) 11 Bom. L. R. 20, followed.
See ARBITRATION 401

Laxmi v. *Aba* (1908) 32 Bom. 631, followed.
See BOMBAY CIVIL COURTS ACT 371

CASES—*continued.* Page

Limji Nowroji Banaji v. *Bapuji Ruttonji Limbuwalla* (1887) 11 Bom. 441, not followed.
See MUKTAD CEREMONIES 122
Mahmudi Sheikh v. *Aji Sheikh* (1894) 21 Cal. 622, dissented from.
See CRIMINAL PROCEDURE CODE 33
Mahomed v. *Krishnan* (1887) 11 Mad. 106, referred to.
See CIVIL PROCEDURE CODE 293
Moro v. *Balaji* (1894) 19 Bom. 809, followed.
See HINDU LAW 88
Motibhai v. *Haridas* (1896) 22 Bom. 315, commented on.
See COURT FEES ACT 658
Muhammad Newaz Khan v. *Alam Khan* (1891) 18 Cal. 414, followed.
See ARBITRATION 491
Muthiah Chetti v. *Emperor* (1905) 29 Mad. 190, dissented from.
See CRIMINAL PROCEDURE CODE 33
Nandram v. *Babaji* (1897) 22 Bom. 771, followed.
See DECREE 273
Nundo Kumar Nasker v. *Banomali Gayan* (1902) 29 Cal. 871, approved.
See CIVIL PROCEDURE CODE 293
Panchappa v. *Sanganbasava* (1899) 24 Bom. 89, considered.
See HINDU WIDOW REMARRIAGE ACT 107
Paramasiva Pillai v. *Emperor* (1906) 30 Mad. 48, dissented from.
See CRIMINAL PROCEDURE CODE 33
Parbati Kunwar v. *Mahmud Fatima* (1907) 29 All. 267, referred to.
See CIVIL PROCEDURE CODE 293
Paskall v. *Passmore* 15 Pa. St. D. 304, referred to.
See BOMBAY MUNICIPAL ACT 335
Peshotam Hormasji Dustoor v. *Meherbai* (1888) 13 Bom. 302, followed.
See CHARITABLE TRUSTS 509
Pita v. *Chunilal* (1906) 31 Bom. 207, followed.
See CIVIL PROCEDURE CODE 698
Pragdas v. *Girdhardas* (1901) 26 Bom. 76, considered and distinguished.
See ADMINISTRATION SUIT 69
Pullbrook v. *Lawes* (1876) 1 Q. B. D. 284, referred to.
See LEASE 610
Queale's Estate, In re (1886) Ir. L. R. 17 Ch. D. 361 at p. 368, followed.
See MORTGAGOR AND MORTGAGEE 1
Ralli Brothers v. *Goculbhai Mulchand* (1890) 15 Bom. 376, applied.
See ADEN COURTS ACT 703

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CASES—*continued.*

Rama v. *Shivram* (1882) 6 Bom. 116, referred to.
See CIVIL PROCEDURE CODE 278

Reg. v. *Gray* [1900] 2 Q. B. 36, followed.
See CONTEMPT OF COURT 240

Runjeet Ram Panday v. *Goburdhun Ram Panday* (1873) 20 W. R. 25 (Civ. Rul.), followed.
See OWNERSHIP 712

Sami Chetti v. *Ammani Achy* (1873) 7 Mad. H. C. R. 260, referred to.
See CIVIL PROCEDURE CODE 293

Samibai v. *Premji Prayji* (1895) 20 Bom. 304, considered and distinguished.
See ADMINISTRATION SUIT 69

Sangapa v. *Gangapa* (1878) 2 Bom. 476, referred to.
See CIVIL PROCEDURE CODE 278

Sayad Gulam Hussein v. *Bibi Anvarnisa* (1885) P. J., p. 170.
See LIMITATION ACT 719

Sreeramulu v. *Kristamma* (1902) 26 Mad. 143, not followed.
See HINDU LAW 88

Sri Sunkur Bharti Swami v. *Sidha Lingayah Charanti* (1843) 3 Moo. I. A. 198, referred to.
See CIVIL PROCEDURE CODE 278

Umed Hathising v. *Goman Bhaiji* (1895) 20 Bom. 385, followed.
See HINDU LAW 39

Vasudeva Shanbhaga v. *Kuleadi Narnapai* (1874) 7 Mad. H. C. R. 290, referred to.
See CIVIL PROCEDURE CODE 293

CAUSE OF ACTION—*Pakki Adat Agency—Place of performance of contract by Pakki Adatya—Custom—Jurisdiction.*
See PAKKI ADAT AGENCY 364

CAUSES OF ACTION, MISJOINDER OF—*Lands situate at different villages and in possession of different persons under different titles—One suit to recover possession of the lands—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial—Civil Procedure Code (Act XIV of 1882), sec. 28.*
See CIVIL PROCEDURE CODE 293

CHARGE—*Lien—Assignment—Transfer of Property Act (IV of 1882) sec. 107.*] The mere fact that parties have described a transaction as a "lien" or "charge" cannot deprive it of its real nature if in substance the transaction was in the first instance an assignment. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person, the words lien or charge have no meaning except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what in English Law is called a *chose in action* transfers it to another.
ARDESIR BEJONJI SURTI v. SYED SIRDAR ALI KHAN ... (1908) 33 Bom. 610

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CHARGES—*Joinder of charges—Misjoinder of charges—Indian Penal Code* (*Act XLV* of 1860), *secs.* 124*A*, 153*A*—*Criminal Procedure Code* (*Act V of* 1898), *secs.* 225, 233, 234, 235, 236 *and* 237.

See CRIMINAL PROCEDURE CODE 77

CHARGES, *Joinder of—Criminal Procedure Code* (*Act V of* 1898), *secs.* 233, 234, 235, 236, 237 *and* 239—*Privy Council, leave to appeal to, in criminal case—Practice and procedure.*

See CRIMINAL PROCEDURE CODE 221

CHARITABLE TRUSTS—*The Trustees and Mortgagees Powers Act* (*XXVIII of* 1866), *sec.* 34—*Non-applicability to Charitable Trusts—Indian Trusts Act* (*II of* 1882), *secs.* 1, 2—*Statute of Frauds* (29 *Ch. ii, C.* 3), *sec.* 7—*Civil Procedure Code* (*Act XIV of* 1882), *sec.* 539—"*Further or other relief*", *meaning of—Parsis—Conversion among Indian Zoroastrians—Juddins—Convert not entitled to certain religious and charitable institutions of Parsis.*] The Trustees and Mortgagees Powers Act (XXVIII of 1866) does not apply to Charitable Trusts. Section 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst other sections section 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events section 34 has ceased to have any force. The saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity. Section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act. Section 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time; even if it did the Indian Evidence Act entirely superseded it.

Held by DAVAR, *J.*:—Section 539 of the Civil Procedure Code, 1882, is very limited in its scope and operation. It contemplates the institution of a suit to "obtain a decree" for reliefs which are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of the section, for the plaintiffs have obtained a decree under three of the five provisions of the section, *viz.* (*a*) the appointment of new trustees, (*b*) vesting trust property in the trustees, and (*c*) settling a scheme. But the reliefs asked for in the second branch of the case, namely, the ascertainment and declaration of what are the trusts, the rectification of the trust-deeds, a declaration that the defendants have either wrongly declared the trust in the deeds or wrongly interpreted the trusts therein, do not fall under any of the five heads mentioned in the section. The words "further or other relief" that follow must necessarily be construed to refer to reliefs *ejusdem generis* and not to reliefs wholly outside those specifically defined under these five heads.

A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within section 539 of the Civil Procedure Code, 1882.

Section 539 contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest" that is threatened or infringed.

A well-established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community.

Peshotam Hormasji Dustoor v. *Meherbai* (1888) 13 Bom. 302 and *Bai Shirinbai* v. *Kharshedji* (1896) 22 Bom. 430, followed.

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Although the conversions of Juddins is permissible amongst Zoroastrians, such conversions are entirely unknown to the Zoroastrian community in India; and far from being customary or usual for it to convert a Juddin, the Zoroastrian community of India has never attempted, encouraged or permitted the conversion of Juddins to Zoroastrianism.

Even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefits of the funds and institutions under the defendants' management and control; these were founded and endowed only for the members of the Parsi community; and the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranis from Persia professing the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

Held by BEAMAN, *J.*:—The decision of a suit under section 539 of the Civil Procedure Code, 1882, is not only binding on the parties to it, but to all persons affected by it.

The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, *e. g.*, removing fraudulent trustees, restraining a breach of trust, and so forth.

Any extension or limitation of the scope of a trust so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust.

The Zoroastrian religion does admit and enjoin conversion. The Indian Zoroastrian while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organisation.

Conversion—In the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time.

It was not the intention of the founders of the trusts in question to extend their benefits to any one who was not in the most rigid caste sense Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father.

SIR DINSHA MANEKJI PETIT *v.* SIR JAMSETJI JIJIBHAI ... (1908) 33 Bom. 509

CITY OF BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888), SEC. 354—*Construction—Municipal Commissioner—Power to remove dangerous structures—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a*

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party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house.

See BOMBAY MUNICIPAL ACT 334

CIVIL NATURE, SUIT OF—*Suit by temple committee against temple servants for declaration as to their right to have the services performed—Civil Court—Jurisdiction—Civil Procedure Code (Act V of 1908), sec. 9.*

See CIVIL PROCEDURE CODE 387

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 11—*Shankaracharya of Sharada Math, plaintiff—Shankaracharya of Dholka, defendant—Dispute as to precedence or privilege between purely religious functionaries—Jurisdiction of Civil Courts.*] The plaintiff, Shankaracharya of the Sharada Math at Dwarka in Gujarát, sued the defendant, Shankaracharya of the Jyotir Math at Dholka in the same province for (1) a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya and that he was not entitled to call for or receive any offerings from the people in Gujarát in his assumed capacity of a Shankaracharya of the Jyotir Math or a branch of that Math; (2) for an account of the money received by the defendant as a Shankaracharya in Gujarat with a decree for payment to the plaintiff of the sum found to have been so received by the defendant; and (3) for an injunction restraining the defendant from styling himself a Shankaracharya in Gujarát and from claiming and receiving offerings in Gujarát as Shankaracharya of the Jyotir Math or a branch of that Math.

The lower Court made a declaration that the defendant was not entitled to call himself a Shankaracharya of the Jyotir Math or of a branch of it at Dholka and an injunction against the defendant so styling himself and claiming or receiving offerings. The claim for an account and recovery of offerings received by the defendant was not allowed as the offerings might or might not have been made to the plaintiff.

On appeal by the defendant,

Held, dismissing the suit, that to decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts, nor will they grant injunctions to prevent preachers from preaching where they like under any title they please provided no office or property is disturbed or interfered with.

For interference with mere dignity no suit can be maintained.

For voluntary offerings received no suit will lie.

Sri Sunkur Bharti Swami v. *Sidha Lingayah Charanti* (1843) 3 Moo. I. A. 198, *Sangapa* v. *Gangapa* (1878) 2 Bom. 476 and *Rama* v. *Shivram* (1882) 6 Bom. 116, referred to.

Boyter v. *Dodsworth* (1796) 6 T. R. 681, followed.

MADHUSUDAN PARVAT *v.* SHRI SHANKARACHARYA ... (1908) 33 Bom. 278

SEC. 13—Res judicata—*Plea of* res judicata *can prevail even where its effect is to sanction what is illegal—Bhágdári and Narwádári Tenures Act (Bom. Act V of 1862), sec 3.*] A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute.

CHHAGANLAL *v.* BAI HARKHA ... ... (1909) 33 Bom. 479

SEC. 28—*Lands situate at different villages and in possession of different persons under different titles—*

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One suit to recover possession of the lands—Misjoinder of parties or causes of action—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial.] The plaintiff, one of the reversionary heirs, sued to recover possession of a moiety of certain lands which were situate at different villages and in possession of different persons who were alienees by sale, mortgage or lease from the widow of the last male holder. In the lower Courts the suit was dismissed for misjoinder of parties or causes of action.

Held, on second appeal, that though the lands were situate in several different villages, provided the venue for the trial is the same, the right of the plaintiff to have her claim tried in one suit is the same as if the different holdings were all in the same village. It is never any bar to a suit in ejectment that many persons are in possession. The only possible objections were on the ground of inconvenience. The difficulties arising from variety of defences can be cured by the successive trial of the issuses separately affecting different defendants. Following the English practice interlocutory judgments may, if the plaintiff succeeds, be given against different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case.

Ishan Chunder Hazra v. *Rameswar Mondol* (1897) 24 Cal. 831 and *Nundo Kumar Nasker* v. *Banomali Gayan* (1902) 29 Cal. 871, approved.

Sami Chetti v. *Ammani Achy* (1873) 7 Mad. H. C. R. 260, *Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (1874) 7 Mad. H. C. R. 290, *Mahomed* v. *Krishnan* (1887) 11 Mad. 106 and *Parbati Kunwar* v. *Mahmud Fatima* (1907) 29 All. 267, referred to.

Kachar Bhoj Vaija v. *Bai Rathore* (1883) 7 Bom. 289, distinguished.

UMABAI *v.* VITHAL ... ... (1908) 33 Bom. 293

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 102, 103, 117—*Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present—Practice.*] Sections 102 and 103 of the Civil Procedure Code do not apply when the plaintiff is present in Court. Notwithstanding the non-appearance of the plaintiff's Counsel the Court can under section 117 of the Code ask the plaintiff questions relating to the suit and can examine his witnesses or suggest that he should instruct some other Counsel to examine the witnesses.

The rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend until he can come in.

ESMAIL EBRAHIM *v.* HAJI JAN MAHOMED ... ... (1908) 33 Bom. 475

SECS. 234, 244, 252—*Hindu Law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Limitation Act (XV of 1877), sch. II, art.* 179.] A money decree obtained against the father of an undivided Hindu family governed by the Mitakshara law can be executed after his death against his sons to the extent of the ancestral property

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that has come to their hands even if the debt has been incurred for the sole purposes of the father provided that it is not tainted with immorality or illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under section 244 of the Civil Procedure Code (Act XIV of 1882).

Umed Hathising v. *Goman Bhaiji* (1895) 20 Bom. 385, followed.

There is no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree. All questions between them and the decree-holder relating to execution must alike be disposed of under section 244 of the Civil Procedure Code (Act XIV of 1882).

Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties.

SHIVRAM *v.* SAKHARAM ... ... (1908) 33 Bom. 39

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 244—*Decree—Execution—Transfer of Property Act* (*IV of* 1882), *sec.* 93.

See DECREE 273

——— SECS. 244, 310A, 311—*Decree—Execution—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under sec.* 310*A when they also fall under sec.* 244, *Civil Procedure Code*, 1882.] Within a month of the sale at a court auction, the judgment-debtor applied to the Court to set aside the sale on the ground that owing to conspiracy among the villagers (including the decree-holder) the sale was at an undervalue. A week later, but within the month allowed, he again applied to the Court to set aside the sale under section 310A of the Civil Procedure Code (Act XIV of 1882), depositing the amount as required by the section. The Subordinate Judge rejected the second application on the ground that it did not lie as the judgment-debtor had already applied to set aside the sale on the ground of irregularity under section 311 of the Code. This order was on appeal reversed by the District Judge. On appeal to the High Court, it was contended, first, that the order passed by the Subordinate Judge was not appealable; and, second, that the second application could not be granted because the judgment-debtor had already applied to set aside the sale under section 311 of the Code.

Held, (1) that the order passed by the Subordinate Judge was appealable.

Pita v. *Chunilal* (1906) 31 Bom. 207, followed.

(2) that the allegation in the first application being that the sale had been brought about by the fraud of the residents of the village where the lands were situate and where the decree-holder resided, the application must be regarded as an application under section 244 and not under section 311 of the Code of Civil Procedure of 1882.

Decree of the District Judge confirmed.

Golam Ahad Chowdhry v. *Judhister Chundra Shaha* (1902) 30 Cal. 142, followed.

HARIHAR KANTA *v.* RAMA PANDU ... ... (1909) 33 Bom. 698

——— SECS. 278, 282, 283 AND 287—*Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave*

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of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estopples binding upon judgment-debtor.] Plaintiffs obtained a money-decree against their debtor and in execution attached the debtor's immoveable property which was already mortgaged with possession to a third person. At the auction-sale the plaintiffs themselves purchased the property with the leave of the Court subject to the mortgage. Before the sale was confirmed and the decree was satisfied the plaintiffs having brought a suit for a declaration that the mortgage was fraudulent and without consideration it was contended that the plaintiffs were no longer judgment-creditors but purchasers and that what was attached and sold was equity of redemption, therefore, the purchasers could not claim more than they bought.

Held, that, as the suit was brought before the confirmation of the sale and the satisfaction of the decree, the plaintiffs were judgment-creditors and not purchasers.

Held, further, that the plaintiffs under their purchase were not purchasers of merely the equity of redemption and were not bound by estoppels which would have bound the judgment-debtor. There is nothing to prevent such a purchaser from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgage.

GANESH *v.* PURSHOTTAM ... ... (1908) 33 Bom. 311

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 320, 323—*Decree—Execution against Tálukdár's estate—Consent of the Tálukdári Settlement Officer—Gujarát Tálukdárs' Act (Bom. Act VI of 1888, as amended by Act II of 1905), sec.* 31.

See GUJARA'T TA'LUKDA'RS' ACT 443

SECS. 373 AND 622—*Dekkhan Agriculturists' Relief Act (XVII of* 1879)—*Civil Procedure Code (Act V of* 1908), *sec.* 115—*Redemption suit—Sale really a mortgage—Sec.* 10*A of the Dekkhan Agriculturists' Relief Act (XVII of* 1879) *not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity.*] Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the plaintiffs brought a redemption suit alleging that the document, though in the form of a sale-deed, was really a mortgage. The suit was not governed by section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant contended that oral evidence was not admissible to prove that the sale-deed was really a mortgage. After the issues were framed the plaintiffs applied for withdrawal of the suit with liberty to bring a fresh suit on the grounds that the different High Courts held different views as to the admissibility or otherwise of oral evidence and that section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not applicable. The Court passed an order for the withdrawal of the suit with liberty to bring a fresh suit.

Held, that the Court acted with material irregularity in passing the order.

The Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant.

A plaintiff cannot be allowed to withdraw a suit in order that he may wait and see if the law is not altered at some future date in such a way as to enable him to obtain a decree against the defendant who is ready for trial and prepared to resist the claim and certain of success on the law in force.

MAHIPATI *v.* NATHU ... ... (1909) 33 Bom. 722

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CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 375—*Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Adjustment of suits, what is—Written submission necessary.*] The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Assistant Commissioner for taking accounts, and a large mass of accounts, objections and surcharges were filed by the various parties. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him. The 1st and 6th defendants with their attorney were present at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained to the 1st and 6th defendants in turn his proposal and told them that whatever award he made would be binding on them. To this they agreed, the 1st defendant even saying he would take one rupee if that was the sum awarded to him. It was also agreed that the Assistant Commissioner should draw up his findings in the form of a consent decree to be taken by the parties as that would save the parties a large sum in costs. At another meeting before the Assistant Commissioner the latter recorded his findings and then proceeded to draw up the consent decree embodying these findings therein but the defendants 1 and 6 refused to be bound by his decision. Upon application being made by the plaintiff that an adjustment of the suit might be recorded under section 375 of the Civil Procedure Code on the basis of the Assistant Commissioner's decision,

Held, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by section 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation, and could therefore have no legal consequences. As there had been no reference to arbitration and no award there could be no adjustment to give effect to under section 375 of the Civil Procedure Code.

Samibai v. *Premji Pragji* (1895) 20 Bom. 301 and *Pragdas* v. *Girdhardas* (1901) 26 Bom. 76, considered and distinguished.

RUKHANBAI *v.* ADAMJI SHAIK RAJBHAI ... ... (1908) 33 Bom. 69

SECS. 503, 505 AND 588—*Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge—Appeal.*] A Subordinate Judge recommended to the District Judge that a certain person be appointed receiver and in case of the recommendation not being accepted, the Názir of his Court should be appointed. The District Judge refused to authorize the Subordinate Judge to appoint either of the persons so recommended.

Against the order of the District Judge an appeal was preferred to the High Court.

Held, that no appeal lay. The District Judge's order was passed under section 505 of the Civil Procedure Code (Act XIV of 1882) and not under section 503. It was therefore an order which was not appealable not being specified in the list of orders in section 588.

Birajan Koer v. *Ram Churn Lall Mahata* (1881) 7 Cal. 719, followed.

BAI MANI *v.* KHIMCHAND ... ... (1908) 33 Bom. 104

SEC. 539—*Religious or Charitable Trusts—"Further or other relief," meaning of.*] *Held by* DAVAR, *J.*:—

Section 539 of the Civil Procedure Code, 1882, is very limited in its scope and operation. It contemplates the institution of a suit to "obtain a decree" for reliefs which are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of the section, for the plaintiffs have obtained a decree under three of the five provisions of the section, *viz.*, (*a*) the appointment of new trustees, (*b*) vesting trust property in the trustees, and (*c*) settling a scheme. But the reliefs asked for in the second branch of the case, namely, the ascertainment and declaration of what are the trusts, the rectification of the trust-deeds, a declaration that the defendants have either wrongly declared the trust in the deeds or wrongly interpreted the trusts therein, do not fall under any of the five heads mentioned in the section. The words "further or other relief" that follow must necessarily be construed to refer to reliefs *ejusdem generis* and not to reliefs wholly outside those specifically defined under these five heads.

A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within section 539 of the Civil Procedure Code, 1882.

Section 539 contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest' that is threatened or infringed.

Held by BEAMAN, *J.*:—The decision of a suit under section 539 of the Civil Procedure Code, 1882, is not only binding on the parties to it, but to all persons affected by it.

The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, *e. g.*, removing fraudulent trustees, restraining a breach of trust, and so forth.

Any extension or limitation of the scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust.

SIR DINSHA MANEKJI PETIT *v.* SIR JAMSETJI JIJIBHAI ... (1908) 33 Bom. 509

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 9—*Civil Court—Jurisdiction—Suit of a civil nature—Suit by temple committee against temple servants for declaration as to their right to have the services performed.*] The plaintiffs, as members of the committee of management of a temple, received annually from Government a sum of money for defraying the expenses of certain kinds of religious worship in the temple, and it was obligatory upon them to get the worship performed by the hereditary officers or servants attached to the temple. Those officers, owing to quarrels among themselves, failed to perform the worship, with the result that the duties owing to the deity were neglected and the funds in the hands of the plaintiffs remained undisbursed for the purposes for which they were held in trust. The plaintiffs, therefore, filed this suit against the temple servants for a declaration of the former's right to disburse the funds by getting the worship performed by a suitable person or persons of their own choice in the event of the hereditary officers or servants of the temple concerned failing to perform it, and for an injunction to restrain those officers or servants from obstructing the plaintiffs in the exercise of the right so declared. It was objected to the suit that it was not triable by a Civil Court because its prayer was for a bare declaration of the plaintiffs' right either to perform by themselves or to get performed certain religious ceremonies in a temple, and there was no contest as to any right to property or to any office.

Held, that the suit was of a civil nature.

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An action would lie against the plaintiffs by the Advocate-General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds after getting the religious worship for which those funds were intended, properly performed. Such a right was not the less of a civil nature though the funds were to be appropriated to religious ceremonies. The Court was not called upon to enter into the adjudication of any rites or ceremonies as such. What it had to decide was the right of the trustees to fulfil the trust unhindered.

TRIMBAK GOPAL *v.* KRISHNARAO PANDURANG ... (1909) 33 Bom. 787

CIVIL PROCEDURE CODE (ACT V OF 1908), O. VI, *r.* 17—*Amendment of pleadings—Defence of the bar of limitation—Practice as to amendment of plaint.*] The plaintiffs alleging that in pursuance of a partnership agreement they delivered Rs. 4,001 worth of cloth to defendants, sued for an order for the dissolution of the partnership and accounts. The Subordinate Judge found that the plaintiffs did deliver Rs 4,001 worth of cloth to the defendants as alleged; but he came to the conclusion that no partnership was created and held that the suit as framed would not lie. The plaintiffs appealed mainly on the ground that the partnership had been created and that the suit was in order. When the appeal came on for hearing this plea was abandoned; the plaintiffs admitted that the facts stated in their plaint did not constitute a partnership and prayed for leave to amend by adding a prayer for the recovery of the Rs. 4,001. At this date the claim for the money was barred by limitation. The lower appellate Court being of opinion that the plaintiffs had from the first intended to sue only for the recovery of their money, but had been misled by their Pleader, allowed the amendment to be made and ultimately allowed the plaintiffs' claim. The defendants in appeal to the High Court contended that the amendment was wrongly allowed.

Held, that the amendment was rightly allowed. The defence of limitation was a defence to which the defendants were never fairly entitled, and the allowance of the amendment only withdrew from them an advantage which they ought never to have received.

PER BATCHELOR, J.:—Under the Civil Procedure Code, 1908, O. VI, *r.* 17, all amendments ought to be allowed, at any stage of the proceedings, which satisfy the two conditions (*a*) of not working injustice to the other side, and (*b*) of being necessary for the purpose of determining the real questions in controversy between the parties.

Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused: to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not?

KISANDAS RUPCHAND *v.* RACHAPPA VITHOBA ... (1909) 33 Bom. 644

COCAINE—*Import by sea into the Bombay Harbour—"Import," meaning of—Sea Customs Act (VIII of 1878), sec. 19—Bombay Abkári Act (Bom. Act V of 1878), secs.* 3 (10), 9, 43.

See BOMBAY ABKARI ACT 380

COMMISSION TO EXAMINE WITNESS—*Insolvent's property at Shanghai—Property of insolvent at Shanghai vests in Official Assignee of the Insolvent*

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Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai—Indian Insolvency Act (11 *and* 12 *Vict., c.* 21), *secs.* 7, 26 *and* 36.

See INSOLVENCY ACT (INDIAN) 462

COMPENSATION—*Compulsory acquisition of land—Method of hypothetical development for fixing value of land to be acquired—Charges as to the costs of the speculator—Compensation based on sales of lands into suitable building sites—The two methods employed in conjunction and producing the same result.*] The method of hypothetical development is open to the objection that it involves or presupposes the intermediation of a third person, called the speculator or exploitor that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes.

The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then, no doubt, allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself.

When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building, it is not only necessary but inappropriate to make a special deduction on account of the small area marked off for the roadway.

Where the method of hypothetical development is employed for assessing compensation in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neighbouring lands, and the consequence is that the two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence but also that the method of hypothetical development is itself corroborated.

In the method of arriving at a valuation of land by reference to prices realised by sales of neighbouring lands, it is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the particular land in question. Differences small or great exist in various conditions, and what precise allowance should be made for these differences is not a matter which can be reduced to any hard and fast rule.

TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY *v.* KARSANDAS (1908) 33 Bom. 28

———"*Market value of land*"—*Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act* (*Bom. Act IV of* 1898)—*Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references—Land Acquisition Act* (*1 of* 1894), *sec.* 23.

See LAND ACQUISITION ACT 483

———*Mode of valuation when no recent sales—Market value—Surveyors' opinions—Objections to surveyors' reports—Determination of value of frontage land—Building frontage, how determined—Relative value of back land*

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and frontage—Hypothetical building scheme, value of—Value of whole land, how derived from value of part—Collector's award—Land Acquisition Act (I of 1894), sec. 18.

See LAND ACQUISITION ACT 325

CONSENT—*Gujarát Tálukdárs' Act (Bom. Act VI of 1888, as amended by Act II of 1905), sec. 31—Decree—Execution against Tálukdár's estate—Consent of the Tálukdári Settlement Officer—Civil Procedure Code (Act XIV of 1882), secs. 320, 323.*] In execution of a money decree against a tálukdár several villages belonging to him were attached: and the darkhást was sent to the Tálukdári Settlement Officer (who combined in himself the functions of Collector and Tálukdári Settlement Officer for the purpose of execution of decrees against or in respect of tálukdári lands) to be dealt with under sections 320—325 of the Civil Procedure Code, 1882. That Officer acting under the sections framed a scheme of management and placed the decree-holder in possession of one of the villages for a given number of years. All this was done after the death of the original judgement-debtor and after the amendment of section 31 of the Gujarát Tálukdárs' Act, 1888, was made in 1905, but in ignorance of the amendment. The Tálukdári Settlement Officer then took up the position that what he had done was done by him under the Civil Procedure Code, 1882; and that as he had not given his written consent to the arrangement as provided by the amended section 31, the darkhást preferred by the decree-holder should be disposed of.

PER CHANDAVARKAR, J.:—If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or, being aware of it, he thought he was consenting in virtue of another office which he held. His ignorance of the law giving him the power cannot make the consent not a consent and is no legal ground or excuse for withdrawing it after he has once given it.

Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium.* In such cases "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can be rebutted by proof that certain forms required by law were not complied with.

Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred.

Section 31 of the Gujarát Tálukdárs' Act (Bom. Act VI of 1888) requires that there must be (1) consent, (2) it must be previous, and (3) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite.

PURSHOTTAM *v.* HARBHAMJI ... ... (1909) 33 Bom. 443

CONSIDERATION—*Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two—Indian Trusts Act (II of 1882), sec. 84—Indian Contract Act (IX of 1872), secs. 2 (g), (h), 20—35, 65.*

See CONTRACT ACT 411

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CONSOLIDATION OF REFERENCES—*City of Bombay Improvement Act (Bom. Act IV of* 1898)—*Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Land Acquisition Act (I of* 1894), *sec.* 23.

See LAND ACQUISITION ACT 483

CONSTRUCTION—*City of Bombay Municipal Act (Bom. Act III of* 1888), *sec.* 354.] The primary object of section 354 of the City of Bombay Municipal Act (Bom. Act III of 1888) is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the right of individuals.

LALBHAI *v.* MUNICIPAL COMMISSIONER OF BOMBAY ... (1908) 33 Bom. 331

CONSTRUCTION OF TEXTS—*Hindu Law—Marriage—Asura form—Brahma form.*] It is a principle enunciated by Vijnaneshvara that where all *smritis* are of equal importance and where there is a conflict between two or more writers, the Court is free to choose any it likes.

CHUNILAL *v.* SURAJRAM ... ... (1909) 33 Bom. 433

CONSTRUCTIVE NOTICE—*Mortgagor and mortgagee—Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title-deeds previously with mortgagees—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.*

See MORTGAGOR AND MORTGAGEE 1

CONTEMPT OF COURT—*Criticism of Judge—Language used in criticism which strikes at the root of all respect for the Court.*] Any act done or writing published, calculated to bring a Court or a Judge of the Court into contempt or to lower his authority, or to obstruct or interfere with due course of justice or the lawful process of the Court is a contempt of Court.

Judges and Court are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, it is not a contempt of Court.

Reg. v. *Gray* [1900] 2 Q. B. 36, followed.

In re NARASINHA CHINTAMAN KELKAR ... ... (1908) 33 Bom. 240

——————— *Notice of motion for committal—Service of notice—Personal service necessary—Service upon attorneys not sufficient—Appeal pending from order.*] Where an application is made for committal of a person to jail for disobedience of the Court's order, it is necessary not only that the order should be served upon the defaulting party personally, but the notice to commit should also be similarly served upon him. Service upon the party's attorneys is not sufficient.

When proceedings are taken for committal of a person for contempt of a Court's order, the Court is not obliged to stay those proceedings merely because an appeal has been filed from such order.

Gordon v. Gordon [1904] P. 163, followed.

BAI MOOLBAI *v.* CHUNILAL PITAMBER ... ... (1909) 33 Bom. 630

CONTRACT—*Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Difference between agreement and*

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contract—Indian Trusts Act (II of 1882), sec. 84—Indian Contract Act (IX of 1872), secs. 2 (g), (h), 20—35, 65.

See CONTRACT ACT 411

———*Place of performance of contract by Pakki Adatya—Custom—Jurisdiction—Pakki Adat agency.*

See PAKKI ADAT AGENCY 364

CONTRACT ACT (IX OF 1872), SECS. 2 (*g*), (*h*), 20—35, 65—*Indian Trusts Act (II of* 1882), *sec.* 84—*Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two.*] By an agreement made between the parties the plaintiff promised to pay the sum of Rs. 1,800 to the defendant as consideration for the latter's promise to marry his niece to the plaintiff's son. But before the marriage could take place the plaintiff's son died of plague. Under the agreement, however, the plaintiff had before her son's death paid to the defendant the sum of Rs. 750. Subsequently the plaintiff having brought a suit to recover that sum, the defendant contended that the agreement being by way of marriage brokerage was void as opposed to public policy and, therefore, under section 65 of the Indian Contract Act (IX of 1872) no sum paid under it could be recovered.

Held, that having regard to the character of the agreement between the parties the plaintiff was entitled to recover the sum from the defendant.

Section 65 of the Indian Contract Act (IX of 1872) provides for the restitution of any advantage received under a contract or agreement. The section preserves the distinction between agreement and contract which is maintained throughout the Act. The section speaks generally of an agreement discovered to be void without any express reference to the cause or origin of the void character, so that an agreement which is void by reason of a principle of law would not on that account fall outside the scope of the section.

GULABCHAND *v.* FULBAI ... ... (1909) 33 Bom. 411

CONTRACT ILLEGAL—*Salt pans—Lease under a license from Collector—Lessee not to sub-let without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Suit by sub-lessee to recover deposit cannot lie—Salt Act (Bom. Act II of* 1890), *secs.* 11 *and* 47.

See SALT ACT 636

COSTS—*Appeals in Probate Proceedings—Pleader's fees—Taxation—Act I of* 1846, *sec.* 7—*Practice.*

See PRACTICE 256

———*Petition—Taxing Master—High Court Rules, Rule* 544—*Solicitors' retainer denied—Taxation of costs.*

See ATTORNEY'S COSTS 667

———*Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present—Practice.*

See PRACTICE 475

COUNSEL COSTS—*Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present—Practice—Civil Procedure Code (Act XIV of* 1882), *secs.* 102, 103 *and* 117.

See CIVIL PROCEDURE CODE 475

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COURT-FEES—*Suit for declaration and consequential relief—Valuation—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1887), sec. 8.*

See SUITS VALUATION ACT 307

COURT-FEES ACT (VII OF 1870), SEC. 7, CL. (IV) (*b*), AND CL. (V)—*Suits Valuation Act (IX of 1887), sec. 8—Suit for partition and separate possession of joint family property—Valuation for Court fee purposes—Market value of subject matter determines jurisdiction—Jurisdiction.*] The plaintiff sued for partition of certain houses, house-sites, moveables and lands, valuing his share in lands at five times the assessment (*i. e.*, at Rs. 489-6-0) for Court fee purposes and in the moveables at Rs. 1,455-8-0. The market value of the plaintiff's share in the lands was Rs. 5,600. The plaint was presented in the Court of First Class Subordinate Judge, as the value of the plaintiff's share was over Rs. 5,000. The Subordinate Judge held that the value for Court-fees, that is, Rs. 1,944-14-0 should be treated as the value for jurisdiction under section 7, clause (iv) (*b*) of the Court-fees Act, 1870, and section 8 of the Suits Valuation Act, 1887, and returned the plaint for presentation in the Court of Second Class Subordinate Judge.

Held, reversing the orders that the suit fell within the jurisdiction of the First Class Subordinate Judge.

Held, further, that the suit fell not within section 7 (iv) (*b*) but under section 7 (v) of the Court-fees Act, 1870, and section 8 of the Suits Valuation Act, 1887, did not apply. That, therefore, it was the market value of the lands, houses, &c., that determined the jurisdiction of the Subordinate Judge.

Motibhai v. *Haridas* (1896) 22 Bom. 315, commented on.

DAGDU *v.* TOTARAM ... ... (1909) 33 Bom. 658

———————————SEC. 31—*Court-fee on petition of complaint—Liability of the workman to pay—Workman's Breach of Contract Act (XIII of 1859), secs. 1, 2.*] In a proceeding under the Workman's Compensation Act where the workman admits the advance and repays the same it is not competent to the Magistrate to make him pay to the complainant the Court fee paid on the petition of complaint.

EMPEROR *v.* DHONDU ... ... (1904) 33 Bom. 22

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 106 (3)—*Order to furnish security—Order can be passed by the appeal Court—Jurisdiction of the appeal Court.*] Section 106, clause 3, of the Criminal Procedure Code (Act V of 1898) makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The word "also" in the clause plainly implies that the order may be independently made by those Courts as well as by the original Courts in the first clause; and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority.

Malmudi Sheikh v. *Aji Sheikh* (1894) 21 Cal. 622, *Muthiah Chetti* v. *Emperor* (1905) 29 Mad. 190 and *Paramasiva Pillai* v. *Emperor* (1906) 30 Mad. 48, dissented from.

Dorasami Naidu v. *Emperor* (1903) 30 Mad. 132, referred to with approval.

EMPEROR *v.* BHAUSING ... ... (1908) 33 Bom. 33

———————————— SECS. 225, 233, 234, 235, 236 AND 237—*Charges—Joinder of charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), secs. 124A and 153A—Sedition—Promoting*

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enmity, etc., between classes—Publication, what constitutes.] The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges, one with respect to each of the two articles he published on different dates in his newspaper called the *Hind Swarajya*. At the trial there was no other evidence of the publication of the newspaper in Bombay except the declaration made by the accused under the Press Act, and the deposit ons of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial.

Held, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

Held, further, that the trial was not bad as there had been no misjoinder of charges.

Per CHANDAVARKAR, J. :—It is true that the Magistrate framed two charges, one with respect to each of the two articles. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A of the Indian Penal Code, so that the accused had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the prosivions of section 225 of the Code of Criminal Procedure.

There is nothing in the Criminal Procedure Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the Indian Penal Code, the section or sections in either case being the same, the joinder of the charges under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind.

Per HEATON, J. :—Section 234 of the Criminal Procedure Code does not say that at most, a trial must be limited to three charges : it says it must be limited to three offences and that the offences must be of the same kind. The "offence" as defined by the Code itself, is the act or omission made punishable. The offences in this case were two in number, namely, the publication of two articles on two different dates These two offences were, as charged, punishable under the same section of the Indian Penal Code, and were, therefore, offences of the same kind. The word "section" in section 234 of the Criminal Procedure Code is not invariably to be read as singular. It is not the intention of the Code of Criminal Procedure, either express or implied, to exclude from the operation of section 234 of the Code, an offence because it is made the subject of more than one charge.

Charging one act or series of acts under more than one section of the Indian Penal Code, is a proceeding provided for in section 235 (clause) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code. The Court may charge an offence twice over under two different sections but by so doing it cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge.

EMPEROR *v.* TRIBHOVANDAS ... ... (1908) 33 Bom. 77

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 233, 234, 235, 236, 237 AND 239—*Charges, joinder of charges—Privy Council, leave to appeal to, in criminal case—Practice and procedure.*] The accused was charged with an

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offence punishable under section 124A of the Indian Penal Code (Act XLV of 1860 in respect of an article which he published in his newspaper and also with offences punishable under sections 124A and 153A of the Code with regard to another article which he published in the same newspaper. For all these offences he was tried at one trial, and was convicted and sentenced for each of them.

Held, that there was no irregularity in the trial on the ground of misjoinder of charges.

Sections 234, 235, 236 and 239 of the Criminal Procedure Code, 1898, mentioned as exceptions in section 233 of the Code, are not mutually exclusive. If it had been intended that section 235 (2) or section 236 could not be made use of in co-operation with section 234, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of section 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

The Legislature could hardly have intended that a joint trial of three offences under section 234 of the Criminal Procedure Code, 1898, should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of.

Sections 235 (2) and 236 of the Criminal Procedure Code, 1898, may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

Before granting a certificate for leave to appeal to the Privy Council, the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

Ex parte Carew [1897] A. C. 719 and *Dinizulu* v. *Attorney-General of Zululand* (1889) 61 L. T. 740, followed.

In re BAL GANGADHAR TILAK ... ... (1908) 33 Bom. 221

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 269—*Trial by Jury—Trial with the aid of assessors—Difference in the modes of trial—Accused if prejudiced can complain—Practice—Procedure.*] The accused were tried with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively.

The Judge charged the jury and asked for their verdict on both the charges in the manner prescribed for jury trials. He agreed with the verdict and sentenced the accused to various terms of imprisonment. The accused appealed on the grounds that the learned Judge erred in omitting to take the opinion of the jurors as assessors on the second charge and to write a judgment.

Held, that the law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trial with the aid of assessors enforced, he cannot be heard to complain.

EMPEROR v. MAYSING ... ... (1909) 33 Bom. 423

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CRITICISM—*Language used in criticism which strikes at the root of all respect for the Court—Contempt of Court.*

See CONTEMPT OF COURT 240

CUSTOM—*Pakki Adat agency—Place of performance of contract by Pakki Adatya—Jurisdiction.*

See PAKKI ADAT AGENCY 364

———*Panchals—Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Burden of proof—Hindu law.*

See HINDU LAW 693

DAMAGES—*Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Misfeasance—Municipality—Negligence.*

See NEGLIGENCE 393

———*Parcel containing articles liable to be insured and also not liable to be insured—Loss of the parcel in transit on Railway line—Suit against Railway Company to recover damages with respect to goods not liable to be insured—Railway Company not liable—Articles—Package—The Indian Railways Act (IX of 1890), sec. 75, sch. II, cl. (l).*

See RAILWAYS ACT 703

DANGEROUS CONDITION—*Power to remove dangerous structures—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house—City of Bombay Municipal Act (Bom. Act III of 1888), sec. 354.*

See BOMBAY MUNICIPAL ACT 334

DEBT—*Hindu law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), secs. 234, 244, 252—Limitation Act (XV of 1877), sch. II, art. 179.*

See HINDU LAW 39

———*Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Hindu law—Civil Procedure Code (Act XIV of 1882), sec. 276.*

See HINDU LAW 264

DECLARATION OF OWNERSHIP, SUIT FOR—*Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession.*] Plaintiff sued for a declaration that he was the owner of the land in suit alleging that the defendant had taken wrongful possession thereof. It was found as a fact that the title to the land was in the plaintiff and that the defendant had made no permanent use of the land inconsistent with its being plaintiff's land.

Held, that plaintiff was entitled to succeed. The said circumstances made out a case for the application of the presumption that possession goes with title.

Runjeet Ram Panday v. *Goburdhun Ram Panday* (1873) 20 W. R. 25 (Civ. Rul.) and *Agency Company* v. *Short* (1888) 13 App. Cas. 793, followed.

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Framji Cursetji v. *Gokuldas Madhowji* (1892) 16 Bom. 338, referred to.

GANPATI *v.* RAGHUNATH ... ... (1909) 33 Bom. 712

DECLARATION, SUIT FOR—*Valuation—Court-fees—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act* (*VII of* 1887), *sec.* 8.

See SUITS VALUATION ACT 307

DECLARATORY DECREE—*Suit by temple committee against temple servants for declaration as to thier right to have the services performed—Suit of a civil nature—Civil Court—Jurisdiction—Civil Procedure Code* (*Act V of* 1908), *sec.* 9.

See CIVIL PROCEDURE CODE 387

DECREE—*Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code* (*Act XIV of* 1882), *secs.* 234, 244, 252—*Limitation Act* (*XV of* 1877), *sch. II, art.* 179.] Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties.

SHIVRAM *v.* SAKHARAM ... ... (1908) 33 Bom. 39

———*Execution—Civil Procedure Code* (*Act XIV of* 1882), *sec.* 244—*Transfer of Property Act* (*IV of* 1882), *sec.* 93.] An application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution.

Where a decree *nisi* contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree.

Ajudhia Pershad v. *Baldeo Singh* (1894) 21 Cal. 818 and *Nandram* v. *Babaji* (1897) 22 Bom. 771, followed.

SIR JEHANGIR COWASJI *v.* THE HOPE MILLS, LIMITED ... (1908) 33 Bom. 273

———*Execution—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under section* 310*A when they also fall under sec.* 244, *Civil Procedure Code*, 1882—*Civil Procedure Code* (*Act XIV of* 1882), *secs.* 244, 310*A*, 311.

See CIVIL PROCEDURE CODE 698

———*Execution against Talukdar's estate—Consent of the Talukdari Settlement Officer—Civil Procedure Code* (*Act XIV of* 1882), *secs.* 320, 323—*Gujarat Talukdars' Act* (*Bom. Act VI of* 1888, *as amended by Act II of* 1905), *sec.* 31.

See GUJARAT TALUKDARS' ACT 443

———*No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree—Appeal against such an order—Practice.*

See PRACTICE 216

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)—*Civil Procedure Code* (*Act XIV of* 1882), *secs.* 373 *and* 623—*Civil Procedure Code* (*Act V of* 1908), *sec.* 115—*Redemption suit—Sale really a mortgage—Sec.* 10*A of the Dekkhan Agriculturists' Relief Act* (*XVII of* 1879) *not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity.*] Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the plaintiffs brought a redemption suit alleging that the document, though in the form of a sale-deed

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was really a mortgage. The suit was not governed by section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant contended that oral evidence was not admissible to prove that the sale-deed was really a mortgage. After the issues were framed the plaintiffs applied for withdrawal of the suit with liberty to bring a fresh suit on the grounds that the different High Courts held different views as to the admissibility or otherwise of oral evidence and that section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not applicable. The Court passed an order for the withdrawal of the suit with liberty to bring a fresh suit.

Held, that the Court acted with material irregularity in passing the order.

The Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant.

A plaintiff cannot be allowed to withdraw a suit in order that he may wait and see if the law is not altered at some future date in such a way as to enable him to obtain a decree against the defendant who is ready for trial and prepared to resist the claim and certain of success on the law in force.

MAHIPATI *v.* NATHU ... ... (1909) 33 Bom. 722

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SEC. 2—*Agriculturist—A person who is an agriculturist in* 1871 *but is not one when the suit is brought in* 1905 *cannot claim the benefit of the Act.*] In 1871, the defendant executed a mortgage in plaintiff's favour. It was provided that the mortgage was not to be redeemed before 1886. The defendant was an agriculturist at the date of the mortgage; but he was not one when the suit was brought. In 1879, the term 'agriculturist' first received a legal definition in the Dekkhan Agriculturists' Relief Act. In the suit by the plaintiff upon the mortgage the defendant claimed the benefits of the Act, on the ground that his liability under the mortgage was not incurred till 1886: it was admitted that the defendant was not an agriculturist at the date of the suit.

Held, that the liability incurred by the defendant was to pay back the money borrowed by him; and that liability was incurred when the money was borrowed in 1871.

Held, further, that in 1871, the defendant, whatever may have been his occupation in fact, could not have been an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which was enacted in 1879.

Held, also, that the defendant was not entitled to the benefit of the Act.

MAHADEV NARAYAN *v.* VINAYAK GANGADHAR ... (1909) 33 Bom. 504

SEC. 2—*"Agriculturist"—Interpretation—"Earns his livelihood"—Sources of income.*] In ascertaining whether a man who has two or more sources of income of which the income from agriculture is one, occupies the status of agriculturist as defined in the Dekkhan Agriculturists' Relief Act (XVII of 1879), the Court must take into account all these sources and ascertain whether the income derived from agriculture is larger or smaller than the rest. All the sources must be taken to be the means of his livelihood and if the income from agriculture exceed the other incomes he must be deemed to be earning his livelihood principally by agriculture.

Dwarkojirav Baburav v. *Balkrishna Bhalchandra* (1894) 19 Bom. 255, explained.

CHUNILAL *v.* VINAYAK ... ... (1909) 33 Bom. 376

SEC. 7—*Defendant summoned for examination—Payment of batta.*] It is not necessary to pay *batta* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

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The *batta* is not payable by the plaintiff and the suit is not liable to be dismissed on failure to pay it.

GANGASHANKAR *v.* BADHUR MADHBHAI ... ... (1908) 33 Bom. 249

DEKKHAN AGRICULTURIS' RELIEF ACT (XVII OF 1879), SEC. 63 (A)—*Mortgage-deed—Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him.*

See TRANSFER OF PROPERTY ACT 44

DISCHARGE OF GUARDIAN—*Liability of the guardian to suit—Guardians and Wards Act (VIII of 1890), sec. 41.*

See GUARDIANS AND WARDS ACT 419

DISCRETION—*Municipal Commissioner—Power to remove dangerous structures—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house—City of Bombay Municipal Act (Bom. Act III of 1888), sec. 354*

See BOMBAY MUNICIPAL ACT 334

DISMISSAL OF SUIT—*Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Civil Procedure Code (Act XIV of 1882), secs. 102, 103, 117.*

See CIVIL PROCEDURE CODE 475

DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901)—*Clerk in the cess-collection department of a District Municipality—Public servant—Obstructions to a public servant—Penal Code (Act XLV of 1860), secs. 21, 186.*

See PENAL CODE 213

DOCUMENT—*Statement by writer—Attestation of two witnesses—Signature of the Sub-Registrar.*

See TRANSFER OF PROPERTY ACT 44

———*Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document—Stamp Act (II of 1899), sec. 2 (5) (b).*

See STAMP ACT 426

EJECTMENT—*Appointment of a Committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by Committee against a trespasser in ejectment—Title.*] The Parsi Panchayat at Bombay appointed a committee to manage the property of the Parsi Anjuman at Surat. The committee managed the property for a very long time—sixty years—with the authority and acquiescence of the Parsi Anjuman. Subsequently the defendant having trespassed on the property, the committee sued him in ejectment. The defendant contended that the plaintiffs had no right to sue for the recovery of the property as they were neither the owners nor the nominees of the Anjuman.

Held, that the plaintiffs being in possession for a long time with the authority and acquiescence of the owners, namely, the Parsi Anjuman at Surat, were entitled to recover possession from a trespasser.

JIVANJI JAMSHEDJI *v.* BARJORJI NASSERVANJI ... (1909) 33 Bom. 499

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EQUITY OF REDEMPTION—*Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Estoppels binding upon judgment-debtor—Civil Procedure Code (Act XIV of 1882), secs. 278, 282, 283 and 287.*

See CIVIL PROCEDURE CODE 311

ESTOPPEL—*Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose"—Transfer of Property Act (IV of 1882), sec. 107—Lien—Charge—Assignment*] Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (*i.e.*, a lease) conduct themselves towards each other as if they were landlord and tenants and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease, because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel.

Cornish v. *Abington* (1859) 4 H. & N. 549, referred to.

ARDESIR BEJONJI SURTI v. SYED SIRDAR ALI KHAN ... (1908) 33 Bom. 610

———*Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtors—Civil Procedure Code (Act XIV of 1882), secs. 278, 282, 283 and 287.*

See CIVIL PROCEDURE CODE 311

———*Transfer of Property Act (IV of 1882), sec. 55, cl. (4) (b), cl. (6)—Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Evidence Act (I of 1872), sec. 115.*] In a registered sale-deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property.

Held, that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title-deeds.

Per BATCHELOR, *J.*:—A vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser.

TEHILRAM *v.* KASHIBAI ... ... (1908) 33 Bom. 53

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VIDENCE ACT (I OF 1872), SEC. 115—*Vendor's lien for unpaid purchase-money —sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money —Estoppel—Transfer of Property Act (IV of 1882), sec. 55, cl. (4) (b), cl. (6).*

See TRANSFER OF PROPERTY ACT 53

EXECUTION—*Decree—Civil Prosedure Code Act (XIV of 1882), sec. 244—Transfer of Property Act (IV of 1882), sec. 93.*] An application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution.

Where a decree *nisi* contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree.

Ajudhia Pershad v. *Baldeo Singh* (1894) 21 Cal. 818 and *Nandram* v. *Babaji* (1897) 22 Bom. 771, followed.

SIR JEHANGIR COWASJI v. THE HOPE MILLS, LIMITED ... (1908) 33 Bom. 273

———*Decree—Execution against Tálukdár's estate—Consent of the Tálukdári Settlement Officer—Civil Procedure Code (Act XIV of 1882), secs. 320, 323—Gujarát Tálukdárs' Act (Bom. Act VI of 1888, as amended by Act II of 1905), sec. 31.*

See GUJARAT TALUKDARS' ACT 443

———*Decree—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under section 310A when they also fall under sec. 244, Civil Procedure Code, 1882—Civil Procedure Code (Act XIV of 1882), secs. 244, 310A, 311.*

See CIVIL PROCEDURE CODE 698

———*Hindu Law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final —Civil Procedure Code (Act XIV of 1882), secs. 234, 244, 252—Limitation Act (XV of 1877), sch. II, art. 179.*

See HINDU LAW 39

———*Money-decree—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment creditor with leave of Court subject to mortgage—Suit by judgement-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtor—Civil Procedure Code (Act XIV of 1882), secs. 278, 282, 283 and 287.*

See CIVIL PROCEDURE CODE 311

———*Toda Giras Allowance—Attachment and sale of in execution of a decree—"Money likely to become due" interpretation of—How far can the allowance be attached and sold—Toda Giras Allowance Act (Bom. Act VII of 1887), sec. 5.*

See TODA GIRAS ALLOWANCE ACT 258

EXECUTOR—*Trustee—Advice of Court as to administration of property—Executor continuing as such—Administration suit—Trusts Act (II of 1882), sec. 34.*

See TRUSTS ACT 429

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FRONTAGE—*Building frontage, how determined—Relative value of back land and frontage—Hypothetical building scheme, value of—Value of whole land, how derived from value of part—Collector's award—Land Acquisition Act (I of* 1894), *sec.* 18.

See LAND ACQUISITION ACT 325

FURTHER OR OTHER RELIEF—*Religious or Charitable Trusts—Civil Procedure Code (Act XIV of* 1882), *sec.* 539.] *Held by* BEAMAN, *J.*:—The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, *e. g.*, removing fraudulent trustees, restraining a breach of trust, and so forth.

SIR DINSHA MANEKJI PETIT *v.* SIR JAMSETJI JIJIBHAI ... (1908) 33 Bom. 509

GUARDIAN—*Order of discharge by the Court—Liability of the guardian to suit—Guardians and Wards Act (VIII of* 1890), *sec.* 41.

See GUARDIANS AND WARDS ACT 419

GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 41—*Guardian—Order of discharge by the Court—Liability of the guardian to suit.*] When a declaration is once made by the Court, under section 41 of the Guardians and Wards Act, 1890, discharging a guardian from liability, the latter cannot be exposed to suits in connection with the management of the minor's property, except in the case of fraud discovered after the declaration.

MURLIDHAR *v.* VALLABHDAS ... ... (1909) 33 Bom. 419

GUJARAT TALUKDARS' ACT (BOM. ACT VI OF 1888, AS AMENDED BY ACT II OF 1905), SEC. 31—*Decree—Execution against Tálukdár's estate—Consent of the Tálukdári Settlement Officer—Civil Procedure Code (Act XIV of* 1882), *secs.* 320, 323.] In execution of a money-decree against a tálukdár, several villages belonging to him were attached; and the darkhást was sent to the Tálukdári Settlement Officer (who combined in himself the functions of Collector and Tálukdári Settlement Officer for the purpose of execution of decrees against or in respect of tálukdári lands) to be dealt with under sections 320—325 of the Civil Procedure Code, 1882. That Officer acting under the sections framed a scheme of management and placed the decree-holder in possession of one of the villages for a given number of years. All this was done after the death of the original judgment-debtor and after the amendment of section 31 of the Gujarát Tálukdárs' Act, 1888, was made in 1905, but in ignorance of the amendment. The Tálukdári Settlement Officer then took up the position that what he had done was done by him under the Civil Procedure Code, 1882; and that as he had not given his written consent to the arrangement as provided by the amended section 31, the darkhást preferred by the decree-holder should be disposed of.

Per CHANDAVARKAR, *J.*:—If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or being aware of it, he thought he was consenting in virtue of another office which he held. His ignorance of the law giving him the power cannot make the consent not a consent, and is no legal ground or excuse for withdrawing it after he has once given it.

Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*,

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In such cases, "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can be rebutted by proof that certain forms required by law were not complied with.

Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred.

Section 31 of the Gujarát Tálukdárs' Act (Bom. Act VI of 1888) requires that there must be (1) consent, (2) it must be previous, and (3) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite.

PURSHOTTAM *v.* HARBHAMJI ... ... (1909) 33 Bom. 443

HIGH COURT'S DISCIPLINARY JURISDICTION—*Pleader—Misbehaviour—Suspension of Sanad—Bombay Regulation II of* 1827, *sec.* 53.

See PLEADER 252

HIGH COURT RULES, RULE 540—*Petition—Taxing Master—Solicitors' retainer denied—Taxation of costs.*] An attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill.

In re Jones (1887) 36 Ch. D. 105, followed.

In re MADHAVJI ... ... (1908) 33 Bom. 667

HINDU LAW—*Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation.*] Where a Hindu widow, who has inherited her husbands' property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage.

Thus, if a widow, before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

Lakshman v. *Radhabai* (1887) 11 Bom. 609 and *Moro* v. *Balaji* (1894) 19 Bom. 809, followed. *Sreeramulu* v. *Kristamma* (1902) 26 Mad. 143, not followed.

RAMAKRISHNA *v.* TRIPURABAI ... ... (1908) 33 Bom. 88

———*Adoption—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth.*] When a married Hindu having a son, is given in adoption, the son does not like his father lose the *gotra* and rights of inheritance in the family of his birth and does not acquire the *gotra* and a right of succession to the property of the family into which his father is adopted.

In the absence of any special custom, Jains are governed by the ordinary Hindu law.

KALGAVDA TAVANAPPA *v.* SOMAPPA TAMANGAVDA ... (1909) 33 Bom. 669

———*Debts—Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Civil*

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Procedure Code (*Act XIV of* 1882), *sec.* 276.] When the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under section 276 of the Code of Civil Procedure, his father is deprived of the power of alienation of that interest in satisfaction of his own debts.

SUBRAYA *v.* NAGAPPA ... ... (1908) 33 Bom. 264

HINDU LAW—*Joint Hindu family—Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers.*] M., a member of a joint Hindu family, being involved in debt, gave a release of his share to his father in consideration amongst other things of a sum of Rs. 5,000. At the time of this release M. had one son living. On this son suing the coparcenary for partition it was held (in Suit No. 423 of 1901) that he was entitled to a share in the joint family property and that the release acted only against his father personally. After the date of this decree M. had another son born, who sued the first son to recover from him a moiety of the sum allotted to the first son on partition.

Held, that the second son was not entitled to any share in the property.

SHIVAJIRAO *v.* VASANTRAO ... ... (1908) 33 Bom. 267

———*Marriage—Asura form—Brahma form—Construction of texts.*] Under Hindu law, where the paternal or maternal relation of a girl, who is given in marriage, receive money consideration for it, the substance of the transaction makes it not a gift but a sale of the girl. The money received is what is called the "bride-price": that is the essential element of the *Asura* form. The fact that the rites prescribed for the *Brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The taint of the *Asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her.

It is a principle enunciated by Vijnaneshvara that where all *smritis* are of equal importance and where there is a conflict between two or more writers, the Court is free to choose any it likes.

CHUNILAL *v.* SURAJRAM ... ... (1909) 33 Bom. 433

———*Mitakshara—Adopted son—Succession to the adopted son—Adoptive mother entitled to succeed in preference to adoptive father.*] Under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed in preference to the adoptive father, to a son taken in adoption.

ANANDI *v.* HARI SUBA ... ... (1909) 33 Bom. 404

———*Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code* (*Act XIV of* 1882), *secs.* 234, 244, 252—*Limitation Act* (*XV of* 1877), *sch. II, art.* 179.] A money-decree obtained against the father of an undivided Hindu family governed by the Mitakshara law can be executed after his death against his sons to the extent of the ancestral property that has come to their hands, even if the debt has been incurred for the sole purposes of the father, provided that it is not tainted with immorality or illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under section 244 of the Civil Procedure Code (Act XIV of 1882).

Umed Hathising v. *Goman Bhaiji* (1895) 20 Bom. 385. followed.

There is no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree. All

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questions between them and the decree-holder relating to execution must alike be disposed of under section 244 of the Civil Procedure Code (Act XIV of 1882).

Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties.

SHIVRAM *v.* SAKHARAM ... ... (1908) 33 Bom. 39

HINDU LAW—*Mitakshara—Stridhan—Succession—Competition between husband and step-son.*] Under the Mitakshara school of Hindu law, when a married Hindu woman dies, leaving no issue, her husband is entitled to succeed to her *stridhan* in preference to her husband's son by another wife.

BHIMACHARYA *v.* RAMACHARYA ... ... (1909) 33 Bom. 452

———*Panchals—Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality—Burden of proof.*] A marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe.

The onus lies upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom.

Inderun Valungypooly Taver v. *Ramasawmy Pandia Tulaver* (1869) 13 Moo. I. A. 141 and *Fakirgauda* v. *Gangi* (1896) 22 Bom. 277, followed.

MAHANTAWA *v.* GANGAWA ... ... (1909) 33 Bom. 693

———*Widow—Gift of a son by first husband in adoption by widow after her re-marriage—Hindu Widow Re-marriage Act (XV of 1856), secs. 2, 3, 4 and 5.*

See ADOPTION 107

———*Widow—Maintenance—Widow having her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Premature suit.*

See MAINTENANCE 50

HINDU WIDOW REMARRIAGE ACT (XV OF 1856), SECS. 2, 3, 4, AND 5—*Hindu widow—Gift of a son by first husband in adoption by widow after her remarriage.*] According to the texts the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Assuming that the mother has by Hindu law a right to give her son in adoption the Hindu Widow Remarriage Act (XV of 1856) does not afford any indication that the legislature intended to deprive her of it.

The right of guardianship, which under the provisions of Act XV of 1856, section 3, may, under certain conditions, be transferred from the mother to one of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

Panchappa v. *Songanbasawa* (1899) 24 Bom. 89, considered.

PUTLABAI *v.* MAHADU ... ... (1908) 33 Bom. 107

HYPOTHETICAL BUILDING SCHEME—*Market value—Mode of valuation when no recent sales—Compensation—Land Acquisition Act (I of 1894), sec. 18.*

See LAND ACQUISITION ACT 325

HYPOTHETICAL DEVELOPMENT—*Method for fixing value of land to be acquired—Charges as to the costs of the speculator—Compensation based on sales of lands into suitable building sites—The two methods employed in conjunction and producing the same result—Compulsory acquisition of land.*

See LAND ACQUISITION 28

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INHERENT POWERS—*Jurisdiction—Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes Court.*] The High Court of Bombay has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding in the Small Causes Court at Bombay with a suit filed by the defendant referring to the same matter to which the suit in the High Court relates; or from filing further suits relating to the same subject matter pending the hearing of the High Court suit.

Jairamdas v. *Zimonlal* (1903) 27 Bom. 357, not followed.

UDERAM KESAJI *v.* HYDERALLY ... ... (1908) 33 Bom. 469

INJUNCTION—*Municipal Commissioner—Power to remove dangerous structures—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—City of Bombay Municipal Act (Bom. Act III of* 1888), *sec.* 354.

See BOMBAY MUNICIPAL ACT 334

———————*Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes Court—Jurisdiction.*

See JURISDICTION 469

———————*Suit for declaration and consequential relief—Valuation—Court-fees—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act (VII of* 1887), *sec.* 8.

See SUITS VALUATION ACT 307

INSOLVENCY ACT, INDIAN (11 AND 12 VICT., C. 21), SECS. 7, 26 AND 36—*Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai.*] The firm of T. and Co. filed their petition in insolvency in Bombay on 29th April 1907 at which time one of the partners M. was at Shanghai. M. subsequently swore his petition at Shanghai on 16th October 1907.

On 16th March 1907 certain creditors of the firm obtained an order directing M. to appear before the Court of Insolvent Debtors at Bombay to be examined under section 36 of the Indian Insolvency Act.

A Rule *nisi* was obtained on behalf of M. calling upon the opposing creditors to show cause why the above order should not be set aside.

These creditors also obtained a Rule *nisi* calling on M. to show cause why he should not deliver up to the Official Assignee goods belonging to the insolvent firm in his possession at Shanghai.

These two Rules were heard together.

Held, that the property of the insolvent debtors' firm in Shanghai vested in the Official Assignee of the Insolvent Debtors' Court at Bombay, and that Court could order M. to hand over such property to the Official Assignee in Bombay.

Held, further, that the Insovent Debtors' Court at Bombay can order the examination of a witness at Shanghai, but cannot direct a witness to come to Bombay to be examined, there being no machinery for that purpose.

IN RE NAOROJI SORABJI TALATI ... ... (1908) 32 Bom. 462

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INTERLOCUTORY JUDGMENTS—*Lands situate at different villages and in possession of different persons under different titles—One suit to recover possession of the lands—Mi-joinder of parties and causes of action—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial—Civil Procedure Code (Act XIV of* 1882), *sec.* 28.

See CIVIL PROCEDURE CODE 293

JAINS—*Adoption—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth—Hindu law.*

See HINDU LAW 669

JOINDER OF CHARGES—*Charges—Misjoinder of charges—Indian Penal Code (Act XLV of* 1860), *secs.* 124*A*, 153*A—Criminal Procedure Code (Act V of* 1898), *secs.* 225, 233, 234, 235, 236 *and* 237.

See CRIMINAL PROCEDURE CODE 77

———————*Criminal Procedure Code (Act V of* 1898), *secs.* 232, 234, 235, 236, 237 *and* 239—*Privy Council, leave to appeal to, in criminal case—Practice and procedure.*

See CRIMINAL PROCEDURE CODE 221

JOINT HINDU FAMILY—*Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers—Hindu law.*

See HINDU LAW 267

JUDDINS—*Conversion among Indian Zoroastrians—Convert not entitled to certain religious and charitable institutions of Parsis.*] *Held by* DAVAR, *J.*:—Although the conversions of Juddins is permissible amongst Zoroastrians, such conversions are entirely unknown to the Zoroastrian community in India; and far from being customary or usual for it to convert a Juddin, the Zoroastrian community of India has never attempted, encouraged or permitted the conversion of Juddins to Zoroastrianism.

Even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefits of the funds and institutions under the defendants' management and control; these were founded and endowed only for the members of the Parsi community; and the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranies from Persia professing the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

Held by BEAMAN, *J.*:—The Zoroastrian religion does admit and enjoin conversion. The Indian Zoroastrians while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organization.

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Conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time.

It was not the intention of the founders of the trusts in question to extend their benefits to any one who was not in the most rigid caste sense Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father.

SIR DINSHA MANEKJI PETIT *v.* SIR JAMSETJI JIJIBHAI ... (1908) 33 Bom. 509

JURISDICTION—*Arbitration—Award—Suit to file an award—Want of jurisdiction in the arbitrators can be pleaded.*

See ARBITRATION 401

———————*Civil Procedure Code* (*Act V of* 1908), *sec.* 9—*Civil Court—Suit of a civil nature—Suit by temple committee against temple servants for declaration as to their right to have the services performed.*] The plaintiffs, as members of the committee of managemment of a temple, received annually from Government a sum of money for defraying the expenses of certain kinds of religious worship in the temple, and it was obligatory upon them to get the worship performed by the hereditary officers or servants attached to the temple. Those officers owing to quarrels among themselves, failed to perform the worship, with the result that the duties owing to the deity were neglected and the funds in the hands of the plaintiffs remained undisbursed for the purposes for which they were held in trust. The plaintiffs, therefore, filed this suit against the temple servants for a declaration of the former's right to disburse the funds by getting the worship performed by a suitable person or persons of their own choice in the event of the hereditary officers or servants of the temple concerned failing to perform it, and for an injunction to restrain those officers or servants from obstructing the plaintiffs in the exercise of the right so declared. It was objected to the suit that it was not triable by a Civil Court because its prayer was for a bare declaration of the plaintiffs' right either to perform by themselves or to get performed certain religious ceremonies in a temple, and there was no contest as to any right to property or to any office.

Held, that the suit was of a civil nature.

An action would lie against the plaintiffs by the Advocate General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds after getting the religious worship for which those funds were intended, properly performed. Such a right was not the less of a civil nature though the funds were to be appropriated to religious ceremonies. The Court was not called upon to enter into the adjudication of any rights or ceremonies as such. What it had to decide was the right of the trustees to fulfil the trust unhindered.

TRIMBAK GOPAL *v.* KRISHNARAO PANDURANG ... (1909) 33 Bom. 387

———————*Court Fees Act* (*VII of* 1870), *sec.* 7, *cl.* (*iv*) (*b*), *sec.* 7, *cl.* (*v*)—*Suits Valuation Act* (*IX of* 1887), *sec.* 8—*Suit for partition and separate possession of joint family property—Valuation for Court-fee purposes—Market value of subject-matter determines jurisdiction.*] The plaintiff sued for partition of certain houses, house-sites, moveables and lands, valuing his share in lands at five times the assessment (*i. e.*, at Rs. 489-6-0) for Court-fee purposes and in the moveables at Rs. 1,455-8 0. The market value of the plaintiff's share in the lands was Rs. 5,600. The plaint was presented in the Court of the First Class Subordinate Judge as the value of the plaintiff's share was over Rs. 5,000. The Subordinate Judge held that the value for Court-fees, that is, Rs. 1,944-14-0 should be treated as the value for jurisdiction under

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section 7, clause (iv) (*b*) of the Court Fees Act, 1870, and section 8 of the Suits Valuation Act, 1887, and returned the plaint for presentation in the Court of the Second Class Subordinate Judge.

Held, reversing the orders that the suit fell within the jurisdiction of the First Class Subordinate Judge.

DAGDU *v.* TOTARAM ... ... (1909) 33 Bom. 658

JURISDICTION—*Dispute as to precedence or privilege between purely religious functionaries—Civil Procedure Code* (*Act XIV of* 1882), *sec.* 11.

See CIVIL PROCEDURE CODE 278

———*Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtors' Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai—Indian Insolvency Act* (11 *and* 12 *Vict., c.* 21), *secs.* 7, 26 *and* 36.

See INSOLVENCY ACT (INDIAN) 462

———*Land Acquisition Act* (*I of* 1894)—*Assistant Judge hearing a claim—Value of the claim under Rs.* 5,000—*Appeal lies to District Court and not to High Court—Practice and procedure—Bombay Civil Courts Act* (*XIV of* 1869), *sec.* 16.

See BOMBAY CIVIL COURTS ACT 371

———*Pakki Adat Agency—Place of performance of contract by Pakki Adatya—Custom.*] K., a Bombay merchant, employed S. as his agent at Akola on the *pakki adat* system. On K.'s instructions S. entered as his agent into certain contracts at Akola. On an agency account being taken, a sum of money was found to be due from S. to K. On K. suing for this sum, S. pleaded that the High Court at Bombay had no jurisdiction to hear the suit on the ground that no part of the cause of action had arisen in Bombay.

Held, in the case of *Pakki Adat* agency primarily the place of payment is the place where the constituent resides, but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit.

Per CHANDAVARKAR, J.:—A pakki adatya's liability ceases when hard cash has come into the hands of his constituent.

KEDARMAL *v.* SURAJMAL ... ... (1909) 33 Bom. 364

———*Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes Court.*] The High Court of Bombay has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding in the Small Causes Court at Bombay with a suit filed by the defendant referring to the same matter to which the suit in the High Court relates; or from filing further suits relating to the same subject matter pending the hearing of the High Court suit.

Jairamdas v. *Zamonlal* (1903) 27 Bom. 357, not followed.

UDERAM KESAJI *v.* HYDERALLY ... ... (1908) 33 Bom. 469

———*Small causes suit—Suit brought in the Court of the First Class Subordinate Judge having small cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge who had no small cause powers—Registering the suit as a regular suit—Trial of the suit by the First Class Subordinate Judge as a regular suit—Suit remains a small cause.*

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A suit of the nature of a small cause was instituted in the Court of the First Class Subordinate Judge who had small cause powers. At the date of its institution, he was on privilege leave and his Court was in the charge of the Joint Second Class Subordinate Judge who had no small cause powers. The suit was therefore registered as a regular suit. On his return from leave the First Class Subordinate Judge tried it as a regular suit. The question having arisen whether the suit was a small cause.

Held, that the First Class Subordinate Judge continued to be a Judge with Small Cause Court powers during his absence on leave, and the entering of the suit in the file of regular suits could not take it away from the category of small causes nor could the fact that the Subordinate Judge tried the suit under his ordinary jurisdiction deprive it of its character as a small cause.

NARAYAN RAVJI *v.* GANGARAM RATANCHAND ... (1909) 33 Bom. 664

JURISDICTION—*Suit for declaration and consequential relief—Valuation—Court-fees—Value of the relief stated in the plaint—Suits Valuation Act (VII of* 1887), *sec.* 8.

See SUITS VALUATION ACT 307

———————*Tipnis Pansare right—Right to levy toll on exports of paddy from foreign territory—Such a right is nibandha under Hindu law—The right is immoveable property—Suit to enforce the right in British Courts.*] The plaintiff sued to recover from the defendant a certain sum of money on account of toll leviable, under a grant from the Peshwas and known as the Tipnis Pansare right, on paddy exported from the territory of the Pant Sachiv to Pen, *viâ* Umber Khind in British territory. The cause of action arose admittedly in foreign territory; but it was contended the suit lay in the British Courts because the defendant resided in British jurisdiction.

Held, overruling the contention, that what the plaintiff claimed was an allowance granted by the Peshwa in permanence, and such an allowance, whether secured on land or not, being according to Hindu law, *nibandha*, was immoveable property.

The Collector of Thána v. *Hari Sitaram* (1882) 6 Bom. 546, followed.

Held, further, that this immoveable property was situate, in the eye of law, in a foreign state; and that the British Court had no jurisdiction to try a suit for the determination of a right to or interest in the property, when the right was denied.

Keshav v. *Vinayak* (1897) 23 Bom. 22, applied.

The Courts in India have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction, but that is upon the ground of a contract or some equity subsisting between the parties respecting immoveables situated out of the jurisdiction.

KRISHNAJI *v.* GAJANAN ... ... (1909) 33 Bom. 373

JURY, TRIAL BY—*Trial with the aid of assessors—Difference in the mode of trial—Accused if prejudiced can complain—Practice—Procedure—Criminal Procedure Code (Act V of* 1898), *sec.* 269.

See CRIMINAL PROCEDURE CODE 423

KURBARS—*Panchals—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality—Burden of proof—Hindu law.*

See HINDU LAW 693

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LAND ACQUISITION—*Compulsory acquisition of land—Compensation—Method of hypothetical development for fixing value of land to be acquired—Charges as to the costs of the speculator—Compensation based on sales of lands into suitable building sites—The two methods employed in conjunction and producing the same result.*] The method of hypothetical development is open to the objection that it involves or presupposes the intermediation of a third person, called the speculator or exploiter, that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes.

The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then, no doubt, allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself.

When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building, it is not only necessary but inappropriate to make a special deduction on account of the small area marked off for the roadway.

Where the method of hypothetical development is employed for assessing compensation in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neighbouring lands, and the consequence is that the two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence but also that the method of hypothetical development is itself corroborated.

In the method of arriving at a valuation of land by reference to prices realised by sales of neighbouring lands, it is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the particular land in question. Differences small or great exist in various conditions, and what precise allowance should be made for these differences is not a matter which can be reduced to any hard and fast rule.

TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY *v.* KARSONDAS (1908) 33 Bom. 28

LAND ACQUISITION ACT (I OF 1894)—*Assistant Judge hearing a claim—Value of the claim under Rs.* 5,000—*Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure—Bombay Civil Courts Act* (*XIV of* 1869), *sec.* 16.

See BOMBAY CIVIL COURTS ACT 371

——————————SEC. 18—*Compensation—Mode of valuation when no recent sales—Market value—Surveyor's opinions—Objections to Surveyor's reports—Determination of value of frontage land—Building frontage, how determined—Relative value of back land and frontage—Hypothetical building scheme, value of—Value of whole land, how derived from value of part—Collector's award.*] In cases where the valuation of land cannot be based on what the property was producing at the time of the notice of acquisition, and where there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood.

The owner in claiming compensation can seek to prove either what the property would fetch if sold in one block, or what is the present value if he plotted out the property and sold it in lots.

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Where no evidence has been adduced of sales in the neighbourhood of such a large block of land as the one under reference the evidence before the Court of sales of small pieces of land in the neighbourhood enables the Court to give an opinion regarding the values of different portions of the block, and the value of the whole must be deduced from these. In addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary, however, to distinguish opinion from argument.

The practice which has grown up in references under the Land Acquisition Act, 1894, of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection. A surveyor's opinion by itself is good evidence.

When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the buildings in the locality.

It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of its cost; and that capital when once invested in land and buildings cannot be apportioned between them so as to give the market value of each.

It cannot be taken as a hard and fast rule that back land must be worth half the frontage land.

PER CURIAM:—"Evidence of hypothetical building schemes is irrelevant to the question of finding the market value of land. The belief that an hypothetical scheme can be a guide to market values ascertained by other means is equally falacious."

The Court would be slow to differ from the Collector's offer on a matter of a few rupees except for very strong reasons such as an error on a question of principle.

IN THE MATTER OF KARIM TAR MAHOMED ... ... (1908) 33 Bom. 325

LAND ACQUISITION ACT (I OF 1894), SEC. 23—"*Market value of land*"—*Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bom. Act IV of 1898)—Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references.*] The Government of Bombay, acting on behalf of the Improvement Trustees, under the City of Bombay Improvement Act (Bombay Act IV of 1898), notified for acquisition nine parcels of land in December 1898. At the date of the notification, J. the owner of the parcels, was in unencumbered possession of only one of them; and the remaining parcels were let on permanent leases as building sites. Between the dates of notification and acquisition, J. bought out the interests of the tenant in one of the parcels. The situation of the land was such that the whole plot consisting of the nine parcels was capable of forming a valuable quarry. The Collector in assessing compensation dealt with all the parcels separately; and refused compensation on a quarrying basis. As regards the seven parcels, the award was arrived at on a rental basis. In all nine cases, references were claimed and made to the Tribunal of Appeal constituted under section 48 of the City of Bombay Improvement Act (Bombay Act IV of 1898). After the Collector had made his award and before the references were heard, J. bought out the tenants' rights in the seven parcels. J. next applied to the Tribunal of Appeal for consolidation of the references into one: this was allowed. The Tribunal of Appeal allowed J.'s claim for compensation for the whole land on a quarrying basis. On appeal, it was objected that the consolidation was wrongly allowed for J. was thereby permitted to advance a claim—namely the claim to the quarrying value—which otherwise he would not have been able to make.

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Held, that the consolidation was rightly allowed and had not the effect which was contended for. It was not by reason of the consolidation of references that J. was enabled to put forward what might be called the quarrying claim: that claim was already before the Collector and the Tribunal, and, whether good or bad, had to be decided on quite other grounds than the arbitrary division of the land made by the Collector.

Held, further, that compensation should not be assessed on a quarriable basis, for the land was never a marketable quarry at the material time, and did not become so till after the Collector had made his award.

Per BATCHELOR, J.:—For the purposes of ascertaining the market value of land under section 23 of the Land Acquisition Act (I of 1894), the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it.

Collector of Belgaum v. *Bhimrao* (1908) 10 Bom. L. R. 657, followed.

The method contemplated by the Land Acquisition Act (I of 1894) for assessing compensation is that of ascertaining first the market value of the land as if all separate interests combined to sell; and then of apportioning that value among the persons interested. The "market value of the land" means the price which would be obtainable in the market for a concrete parcel of land with its particular advantages and its particular drawbacks, both advantages and drawbacks being estimated rather with reference to commercial value than with reference to any abstract legal rights.

Per HEATON, J.:—Taking the scope of the Land Acquisition Act (I of 1894) and its words, it seems that in ascertaining compensation for land taken up neither the method of valuing each interest in it separately nor the method of valuing the land as a whole and then apportioning to each person interested the share to which he is entitled, is excluded. What is intended is a fair and reasonable estimate of the compensation to be awarded: and this is to be arrived at by taking into consideration certain specified matters and excluding from consideration others. The Act seems to leave a great deal to the discretion of the Collector and the Court, and amongst other matters, to leave it to their discretion to ascertain the market value of the land by either of the two methods. This opinion does not conflict with what was decided in *Collector of Belgaum* v. *Bhimrao* (1908) 10 Bom. L. R. 657.

BOMBAY IMPROVEMENT TRUST *v.* JALBHOY ... ... (1909) 33 Bom. 483

LEASE—*Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose"—Transfer of Property Act (IV of* 1882), *sec.* 107—*Lien—Charge—Assignment.*] Where a lease which requires registration is not registered it cannot be put in evidence. But if the parties to it have acted upon its terms, whatever they were, or if a certain course of conduct has been pursued by either party which in point of fact constitutes the relation of landlord and tenant between them, and if in pursuance of that relation one party has paid certain moneys from time to time to another as a deposit to secure the performance by the former of the covenants and conditions of the lease, then a person suing to recover the money so deposited may give the lease in evidence for the purpose of proving his right to recover the deposit.

Such admission of the lease would not contravene the provisions of the Registration Act, because it would in that case be put in evidence not for the purpose of affecting any immoveable property but for a collateral purpose, *i.e.*, for the purpose of proving a money debt arising from the conduct of the parties.

Pullbrook v. *Lawes* (1876) 1 Q. B. D. 284, referred to.

Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (*i.e.*, a lease) conduct themselves towards each other

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as if they were landlord and tenant and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel.

Cornish v. *Abington* (1859) 4 H. & N. 549, referred to.

The mere fact that parties have described a transaction as a "lien" or "charge" cannot deprive it of its real nature if in substance the transaction was in the first instance an assignment. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person the words lien or charge have no meaning, except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one whereby the owner of what in English law is called a *chose in action* transfers it to another.

ARDESIR BEJONJI *v.* SYED SIRDAR ALI KHAN ... (1909) 33 Bom. 610

LEASE—*Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary—Transfer of Property Act* (*IV of* 1882), *sec.* 50.

See TRANSFER OF PROPERTY ACT 96

———*Salt pans—Lease under a license from Collector—Lessee not to sub-let without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie—Salt Act* (*Bom. Act II of* 1890), *secs.* 11 *and* 47.

See SALT ACT 636

LEAVE TO APPEAL TO PRIVY COUNCIL—*Joinder of charges—Criminal Procedure Code* (*Act V of* 1898), *secs.* 233, 234, 235, 236, 237 *and* 239—*Practice.*

See CRIMINAL PROCEDURE CODE 221

LICENSE—*Salt pans—Lease under a license from Collector—Lessee not to sublet without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie—Salt Act* (*Bom. Act II of* 1890), *secs.* 11 *and* 47.

See SALT ACT 636

LIEN—*Charge—Assignment—Transfer of Property Act* (*IV of* 1882), *sec.* 107—The mere fact that parties have described a transaction as a "lien" or "charge" cannot deprive it of its real nature, if in substance the transaction was in the first instance an assignment. Where a creditor purports to create a lien or charge on the debt due to him in favour of another person the words lien or charge have no meaning, except as giving the latter a right to recover the debt from the debtor.

ARDESIR BEJONJI *v.* SYED SIRDAR ALI KHAN ... (1908) 33 Bom. 610

———*Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration-money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Estoppel—Evidence Act* (*I of* 1872), *sec.* 115—*Transfer of Property Act* (*IV of* 1882), *sec.* 55, *cl.* (4) (*b*), *cl.* (6).

See TRANSFER OF PROPERTY ACT 53

LIMITATION—*Bhagdari Act* (*Bom. Act V of* 1862), *sec.* 3—*Bhag—Unrecognised sub-division of a bhag—Alienation—Suit to set aside the alienation.*] Possession acquired under an alienation made in contravention of section 3 of the

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Bhagdari Act (Bombay Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest.

The Bhagdari Act (Bombay Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

Dala v. *Parag* (1902) 4 Bom. L. R. 797 and *Jethabhai* v. *Nathabhai* (1904) 28 Bom. 399, distinguished.

ADAM UMAR *v.* BAPU BAWAJI ... ... (1908) 33 Bom. 116

LIMITATION ACT (XV OF 1877), SCH. II, ART. 127—*Suit by a Mahomedan daughter to recover her share in her deceased father's property—Limitation.*] Article 127, Schedule II of the Limitation Act (XV of 1877) applies to a suit by the daughter of a deceased Mahomedan to recover her share in his property.

Sayad Gulam Hussein v. *Bibi Anvarnisa* P. J. 1885, p. 170, followed.

BOO FATMA *v.* BOO GHISANBOO ... ... (1909) 33 Bom. 719

———————————ART. 178—*Hindu law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of* 1882), *secs.* 234, 244, 252.

See HINDU LAW 39

MAHOMEDAN, SUIT BY—*Limitation Act (XV of* 1877), *sch. II, art.* 127.

See LIMITATION ACT 719

MAINTENANCE—*Hindu widow—Widow having her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Premature suit.*] The plaintiff, a Hindu widow, filed a suit to recover arrears of maintenance and to obtain a declaration of her right to maintenance. At the time the suit was brought, she was found to be in possession of a fund belonging to her husband's family estate, which sum was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court.

Held, that no cause of action had accrued to the plaintiff. At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later.

DATTATRAYA WAMAN *v.* RUKHMABAI ... ... (1908) 33 Bom. 50

MARKET VALUE OF LAND—*Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bom. Act IV of* 1898)—*Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references—Land Acquisition Act (I of* 1894), *sec.* 23.

See LAND ACQUISITION ACT 483

———————————*Valuation—Mode of valuation when no recent sales—Compensation—Land Acquisition Act (I of* 1894), *sec.* 18.] In cases where the valuation of land cannot be based on what the property was producing at the time of the notice of acquisition, and where there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood.

IN THE MATTER OF KARIM TAR MAHOMED ... (1908) 33 Bom. 325

MARRIAGE—*Asura form—Brahma form—Construction of texts—Hindu law.*

See HINDU LAW 433

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MARRIAGE—*Panchals—Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality—Burden of proof—Hindu law.*

See HINDU LAW 693

MATERIAL IRREGULARITY—*Redemption suit—Sale really a mortgage—Sec.* 10*A of the Dekkhan Agriculturists' Relief Act* (*XVII of* 1879) *not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Civil Procedure Code* (*Act XIV of* 1882), *secs.* 373 *and* 622—*Dekkhan Agriculturists' Relief Act* (*XVII of* 1879).

See CIVIL PROCEDURE CODE 722

MISFEASANCE—*The Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Municipality—Negligence.*

See NEGLIGENCE 393

MISJOINDER OF CHARGES—*Penal Code* (*Act XLV of* 1860), *secs.* 124*A*, 153*A—Sedition—Promoting enmity, etc., between classes—Publication, what constitutes—Criminal Procedure Code* (*Act V of* 1898), *secs.* 225, 234, 235, 236 *and* 237.

See CRIMINAL PROCEDURE CODE 77

———————PARTIES.

See CIVIL PROCEDURE CODE 293

MITAKSHARA—*Liability of sons to pay father's debt—Hindu law.*

See HINDU LAW 39

MONEY-DECREE—*Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtor—Civil Procedure Code* (*Act XIV of* 1882), *secs.* 278, 282, 283 *and* 287.

See CIVIL PROCEDURE CODE 311

MORTGAGE—*Transfer of Property Act* (*IV of* 1882), *sec.* 50—*Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.*] On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna, and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same.

Held, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice

of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary.

KAVERIAMMA *v.* LINGAPPA ... ... (1908) 33 Bom. 96

MORTGAGE DEED—*Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him—Transfer of Property Act (IV of 1882), sec. 59—Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 63 (A).*

See TRANSFER OF PROPERTY ACT 44

MORTGAGOR AND MORTGAGEE—*Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title-deeds previously with mortgagees—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.*] A Hindu carrying on business in Bombay died in 1885 having executed a will by which he left to his four elder sons certain immoveable property subject to a charge of Rs. 30,000 in favour of his widow and four younger sons, and made his four elder sons executors and residuary legatees of his will directing them to carry on the business. After their father's death the elder sons in the course of their business transactions became indebted to the Bank of Bombay in respect of advances by the Bank, to secure which, on 13th September 1890 (two of the younger sons being then minors), the elder sons deposited with the Bank by way of equitable mortgage certain title-deeds relating to the property charged by the will; and on 12th January 1899 executed a mortgage of the same property in favour of the Bank for Rs. 52,000 without stating the charge upon it. In one of the documents of title deposited with the Bank the title of the mortgagors was indicated, and had the Bank investigated the title (which they did not do) they would have been put upon inquiry and would have become aware of the charge created on the property by the will. The younger sons only became aware of the transaction in June 1903 when the Bank advertised the property for sale under their mortgage. In a suit brought by them on 15th September 1903 against the Bank and the mortgagors to establish the priority of their charge over the mortgage to the Bank, the latter pleaded that the mortgage was made for valuable consideration, and that they were *bonâ fide* transferees without notice.

Held (upholding the decision of the High Court), that under the circumstances the Bank had constructive notice of the charge under the will. The Bank had on the facts dealt with the mortgagors not as executors but as persons pledging their own property for their own debts, and under the circumstances took no better title than that which their debtors really had in the capacity in which they were dealt with, namely, residuary legatees.

In re Queale's Estate (1886) Ir. L. R. 17 Ch. D. 361 at p. 368, followed.

Held, also, that the plaintiffs being legatees the Bank took the property subject to the charge upon it created by the will. Distinction drawn between the creditors and legatees in such a case: Spence's "Equitable Jurisdiction," Vol. II, page 376, referred to.

By the terms of the will the legacy was to be made up and paid within six years after the testator's death which period expired in 1891, and the mortgage was not executed until eight years afterwards; and it was contended that assuming that the Bank had notice of the will they were entitled to assume that the executors were acting with the consent of the legatees (plaintiffs).

Held that, although in cases of this kind delay was a circumstance to be taken into consideration, yet, having regard to the fact that two of the plaintiffs were still minors when the title-deeds were deposited with the Bank, and that con-

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tinued possession by the executors and mortgagors was not inconsistent with the purposes of the will, the rights of the parties were unaffected by that circumstance.

BANK OF BOMBAY *v.* SULEMAN SOMJI ... ... (1908) 33 Bom. 1

MUKTAD CEREMONIES—*Trusts to perform Muktad ceremonies, validity of—Tenets of Zoroastrian faith—Nature and meaning of Muktad Ceremonies—Ceremonies tending towards the advancement of religion—Practice—How far decision by single Judge binding on his successors.*] Trusts and bequests of lands or money for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktad, Baj, Yejushni, and other like ceremonies, are valid "charitable" bequests, and as such exempt from the application of the rule of law forbidding perpetuities.

The Farvardigan days are the most holy days during the Zoroastrian year and the performance of Muktad ceremonies during the Farvardigan days is enjoined by the Scriptures of the Zoroastrian religion.

The performance of the Muktad ceremonies is a *religious duty* imposed on the Zoroastrians by the proved tenets of the religion they profess.

The ceremonies themselves are acts of religious worship. They include worship, praise, and adoration for the Supreme Deity, and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual, for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well-being and long reign of the sovereign, for good government by him, and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster and there can be no doubt that the performance of these ceremonies is an act of Divine Worship in its highest and truest sense.

The monies paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

According to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator.

A Judge sitting on the original side is bound ordinarily to follow the judgment of another Judge when he has decided a point of law, or laid down certain principles of practice or procedure or judicially construed any provision of the law prevailing in the country. But a single Judge is not bound to follow another Judge's *findings of fact based on the evidence recorded by him*, when the evidence that may be available before a Judge in a later case may be fuller or more reliable and may tend to lead him to a different conclusion.

Limji Nowroji Banaji v. *Bapuji Ruttonji Limbuwalla* (1887) 11 Bom. 441, not followed.

JAMSHEDJI C. TARACHAND *v.* SOONABAI ... ... (1907) 33 Bom. 122

MUNICIPALITY—*Clerk in the cess-collection department of a District Municipality—Bombay District Municipal Act (Bom. Act III of 1901)—Public servant—Obstruction to a public servant—Penal Code (Act XLV of 1860), secs. 21, 186.*

See PENAL CODE 213

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MUNICIPALITY—*The Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Misfeasance—Negligence.*

See NEGLIGENCE 393

NEGLIGENCE—*Municipality—The Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Misfeasance.*] The plaintiff sued to recover damages from the defendant Municipality for injury done to his property by storm water. The water had collected in an adjoining ditch, which the Municipality had not kept in a state of repair, but had allowed it to be choked with the rubbish of the town. They constructed a dam in the adjoining creek, but allowed the sluices at the dam to be choked up with weeds, sedges and silt. The consequence was that the storm water which had collected in the creek passed on to the plaintiff's land and did damage.

Held, that there was misfeasance on the part of the Municipality, for they had turned their works by their negligence into a nuisance so as to throw the water collected on their property—the creek—on to the plaintiff's land, and that, therefore, they were liable for the damage caused thereby.

Borough of Bathurst v. *Macpherson* (1879) 4 App. Cas. 256, followed.

RAJENDRALAL *v.* SURAT CITY MUNICIPALITY ... (1908) 33 Bom. 393

NIBANDHA—*Tipnis Pansare right—Right to levy toll on exports of paddy from foreign territory—Such a right is nibandha under Hindu law—The right is immoveable property—Suit to enforce the right in British Courts—Jurisdiction.*

See JURISDICTION 373

NOTICE—*Mortgagor and Mortgagee—Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title-deeds previously with mortgagees—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.*

See MORTGAGOR AND MORTGAGEE 1

————SERVICE OF—*Contempt of Court—Notice of motion for committal—Personal service necessary—Service upon attorneys not sufficient.*] Where an application is made for committal of a person to jail for disobedience of the Court's order, it is necessary not only that the order should be served upon the defaulting party personally, but the notice to commit should also be similarly served upon him. Service upon the party's attorneys is not sufficient.

BAI MOOLBAI *v.* CHUNILAL PITAMBER ... (1909) 33 Bom. 630

NUISANCE—*Negligence—Municipality—The Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Misfeasance.*] The plaintiff sued to recover damages from the defendant Municipality for injury done to his property by storm water. The water had collected in an adjoining ditch, which the Municipality had not kept in a state of repair, but had allowed it to be choked with the rubbish of the town. They constructed a dam in the adjoining creek, but allowed the sluices at the dam to be choked up with weeds, sedges and silt. The consequence was that the storm water which had collected in the creek passed on to the plaintiff's land and did damage.

Held, that there was misfeasance on the part of the Municipality, for they had turned their works by their negligence into a nuisance so as to throw the water

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collected on their property—the creek—on to the plaintiff's land, and that, therefore, they were liable for the damage caused thereby.

Borough of Bathurst v. *Macpherson* (1879) 4 App. Cas. 256, followed.

RAJENDRALAL *v.* SURAT CITY MUNICIPALITY ... (1908) 33 Bom. 393

OFFICIAL ASSIGNEE—*Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai—Indian Insolvency Act* (11 *and* 12 *Vict*, *c.* 21), *secs.* 7, 26 *and* 36.

See INSOLVENCY ACT (INDIAN) 462

ONUS—*Hindu law—Panchals—Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality.*] A marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub-divisions of the Shudra tribe.

The onus lies upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom.

Inderun Valungypooly Taver v. *Ramasawmy Pandia Talaver* (1869) 13 Moo. I. A. 141 and *Fakirgauda* v. *Gangi* (1896) 22 Bom. 277, followed.

MAHANTAWA *v.* GANGAWA ... ... (1909) 33 Bom. 693

OUSTER—*Adverse possession—Adverse possession between tenants-in-common—What constitutes adverse possession—Acts of exclusive possession.*

See ADVERSE POSSESSION 317

OWNERSHIP—*Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession.*] Plaintiff sued for a declaration that he was the owner of the land in suit alleging that the defendant had taken wrongful possession thereof. It was found as a fact that the title to the land was in the plaintiff and that the defendant had made no permanent use of the land inconsistent with its being plaintiff's land.

Held that plaintiff was entitled to succeed. The said circumstances made out a case for the application of the presumption that possession goes with title.

Runjeet Ram Panday v. *Goburdhun Ram Panday* (1873) 20 W. R. 25 (Civ. Rul.) and *Agency Company* v. *Short* (1888) 13 App. Cas. 793, followed.

Framji Cursetji v. *Goculdas Madhowji* (1892) 16 Bom. 338, referred to.

GANPATI *v.* RAGHUNATH ... ... (1909) 33 Bom. 712

PAKKI ADAT AGENCY—*Place of performance of contract by Pakki Adatya—Custom—Jurisdiction.*] K., a Bombay merchant, employed S. as his agent at Akola on the *pakki adat* system. On K.'s instructions S. entered as his agent into certain contracts at Akola. On an agency account being taken a sum of money was found to be due from S. to K. On K. suing for this sum S. pleaded that the High Court at Bombay had no jurisdiction to hear the suit on the ground that no part of the cause of action had arisen in Bombay.

Held, in the case of *Pakki Adat* agency primarily the place of payment is the place where the constituent resides, but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit.

Per CHANDAVARKAR, *J.*:—A pakki adatya's liability ceases when hard cash has come into the hands of his constituent.

KEDARMAL *v.* SURAJMAL ... ... (1908) 33 Bom. 364

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PANCHALS—*Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality—Burden of proof—Hindu law.*

See HINDU LAW 693

PARSI RELIGION—*Tenets of Zoroastrian faith—Trusts to perform Muktad ceremonies, validity of—Nature and meaning of Muktad ceremonies—Ceremonies tending towards the advancement of religion.*

See MUKTAD CEREMONIES 122

PARSIS—*Conversion among Indian Zoroastrians—Juddins—Convert not entitled to certain religious and charitable institutions of Parsis.*

See CHARITABLE TRUSTS 569

PARTIES, MISJOINDER OF—*Lands situate at different villages and in possession of different persons under different titles—One suit to recover possession of the lands—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial—Civil Procedure Code (Act XIV of 1882), sec. 28.*

See CIVIL PROCEDURE CODE 293

PARTITION—*Joint Hindu family—Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers—Hindu law.*

See HINDU LAW 267

——— SUIT—*Valuation for Court-fee purposes—Market value of subject-matter determines jurisdiction—Jurisdiction—Suits Valuation Act (IX of 1887), sec. 8—Court Fees Act (VII of 1870), sec. 7, cl. (iv) (b) and cl. (v).*

See COURT FEES ACT 658

PENAL CODE (ACT XLV OF 1860), SECS. 21, 186—*Public servant—Obstruction to a public servant—Clerk in the cess-collection department of a District Municipality—Bombay District Municipal Act (Bom. Act III of 1901).*] A clerk in the cess-collection department of a District Municipality constituted under the Bombay District Municipal Act (Bom. Act III of 1901) is a public servant within the meaning of section 21, clause 10 of the Indian Penal Code (Act XLV of 1860); and any obstruction offered to him in execution of his duties is an offence punishable under section 186 of the Code.

EMPEROR *v.* BABULAL ... ... (1908) 33 Bom. 213

——— SECS. 124A, 153A—*Sedition—Promoting enmity, &c., between classes—Publication, what constitutes—Criminal Procedure Code (Act V of 1898), secs. 225, 233, 234, 235, 236 and 237—Charges—Joinder of charges—Misjoinder of charges.*] The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges, one with respect to each of the two articles he published on different dates in his newspaper called the *Hind Swarajya*. At the trial there was no other evidence of the publication of the newspaper in Bombay except the declaration made by the accused under the Press Act, and the depositions of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial.

Held, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

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Held, further, that the trial was not bad as there had been no misjoinder of charges.

EMPEROR *v.* TRIBHOVANDAS ... ... (1908) 33 Bom. 77

PLACE OF PAYMENT—*Pakki Adat Agency—Place of performance of contract by Pakki Adatya—Custom—Jurisdiction.*

See PAKKI ADAT AGENCY 364

PLEADER—*Bombay Regulation II of* 1827, *sec.* 56—*Misbehaviour—Suspension of Sanad—High Court's disciplinary jurisdiction.*] Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice gives them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt.

A pleader, who presides at a public meeting and therein procures the passing of a resolution contemptuously denouncing or protesting against the conduct of a High Court Judge in passing sentence at a trial at the Criminal Sessions, is guilty of misbehaviour (under section 56 of Regulation II of 1827).

GOVERNMENT PLEADER *v.* JAGANNATH ... ... (1908) 33 Bom. 252

PLEADER'S FEES—*Appeals in Probate Proceedings—Scale of costs—Act I of* 1846, *sec.* 7—*Practice.*

See PRACTICE 256

POSSESSION—*Appointment of a Committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by Committee against a trespasser in ejectment—Title.*] The Parsi Panchayat at Bombay appointed a Committee to manage the property of the Parsi Anjuman at Surat. The committee managed the property for a very long time—sixty years—with the authority and acquiescence of the Parsi Anjuman. Subsequently the defendant having trespassed on the property, the Committee sued him in ejectment. The defendant contended that the plaintiffs had no right to sue for the recovery of the property as they were neither the owners nor the nominees of the Anjuman.

Held, that the plaintiffs being in possession for a long time with the authority and acquiescence of the owners, namely, the Parsi Anjuman at Surat, were entitled to recover possession from a trespasser.

JIVANJI JAMSHEDJI *v.* BARJORJI NASSERVANJI ... (1909) 33 Bom. 499

———*Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession.*

See OWNERSHIP 712

PRACTICE—*Allegations by parties at trial—Case determined on those allegations—Making a new case in appeal.*] A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit.

NATHU PIRAJI *v.* UMEDMAL GADUMAL ... ... (1908) 33 Bom. 35

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PRACTICE—*Amendment of pleadings—Defence of the bar of limitation—Practice as to amendment of plaint—Civil Procedure Code (Act V of 1908), O. VI, r. 17.*

See CIVIL PROCEDURE CODE 614

———*Bombay Civil Courts Act (XIV of 1869), sec. 16—Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs. 5,000—Appeal lies to District Court and not to High Court—Jurisdiction.*

See BOMBAY CIVIL COURTS ACT 371

———*Criminal Procedure Code (Act V of 1898), sec. 269—Trial by Jury—Trial with the aid of assessors—Difference in the modes of trial—Accused if prejudiced can complain—Procedure.*] The accused were tried with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively.

The Judge charged the jury and asked for their verdict on both the charges in the manner prescribed for jury trials. He agreed with the verdict and sentenced the accused to various terms of imprisonment. The accused appealed on the grounds that the learned Judge erred in omitting to take the opinion of the jurors as assessors in the second charge and to write a judgment.

Held, that the law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain.

EMPEROR *v.* MAVSING ... ... (1909) 33 Bom. 423

———*Decree—No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree—Appeal against such an order.*] A decree of the High Court on the Original Side contemplated an account being taken between the parties but it was silent on the question as to how that account was to be taken, whether by the Commissioner or by some person selected by both the parties. The Court of first instance decided that where a direction as to account ought to have been incorporated in a decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken.

Held, on appeal, that as some account was taken under the decree by a person appointed jointly by the parties, a new agreement had come into existence superseding the decree, and the Court was not competent to make the order appealed against.

An appeal lies against an order of a Judge sitting on the Original Side if that order decides a question of some right between the parties.

SIR JEHANGIR COWASJI *v.* THE HOPE MILLS, LIMITED ... (1908) 33 Bom. 216

———*How far decision by single Judge binding on his successors.*] A Judge sitting on the original side is bound ordinarily to follow the judgment of another Judge when he has decided a point of law, or laid down certain principles of practice or procedure or judicially construed any provision of the law prevailing in the country. But a single Judge is not bound to follow another Judge's *findings of fact based on the evidence recorded by him*, when the evidence that may

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be available before a Judge in a later case may be fuller or more reliable and may tend to lead him to a different conclusion.

JAMSHEDJI C. TARACHAND *v.* SOONABAI ... ... (1907) 33 Bom. 122

PRACTICE—*Joinder of charges—Privy Council, leave to appeal to, in criminal case.*] Before granting a certificate for leave to appeal to the Privy Council, the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

Ex parte Carew [1897] A. C. 719 and *Dinizulu* v. *Attorney-General of Zululand* (1889) 61 L. T. 740, followed.

In re BAL GANGADHAR TILAK ... ... (1908) 33 Bom. 221

———*Lands situate at different villages and in possession of different persons under different titles—One suit to recover possession of the lands—Misjoinder of parties or causes of action—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial—Civil Procedure Code (Act XIV of* 1882), *sec.* 28.

See CIVIL PROCEDURE CODE 293

———*Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present.*] The rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time, if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend until he can come in.

ESMAIL EBRAHIM *v.* HAJI JAN MAHOMED ... ... (1908) 33 Rom. 475

———*Taxation—Pleader's fees—Appeals in Probate Proceedings—Scale of costs—Act I of* 1846, *sec.* 7.] The taxation of pleader's fees in appeals from probate proceedings should, according to a long standing practice of the High Court of Bombay, be valued at Rs. 30.

SUNDRABAI *v.* THE COLLECTOR OF BELGAUM ... (1908) 33 Bom. 256

PRESUMPTION—*Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Possession goes with title—Adverse possession.*

See OWNERSHIP 712

PRIVY COUNCIL—*Leave to appeal to the Privy Council in criminal case—Practice—Joinder of charges—Criminal Procedure Code (Act V of* 1898), *secs.* 233, 234, 235, 236, 237 *and* 239.] Before granting a certificate for leave to appeal to the Privy Council, the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

Ex parte Carew [1897] A. C. 719 and *Dinizulu* v. *Attorney-General of Zululand* (1889) 61 L. T. 740, followed.

In re BAL GANGADHAR TILAK ... ... (1908) 33 Bom. 221

PROBATE—*Appeals in Probate Proceedings—Pleader's fees—Taxation—Scale of costs—Act I of* 1846, *sec.* 7—*Practice.*

See PRACTICE 256

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PUBLIC SERVANT—*Obstruction to a public servant—Clerk in the cess-collection department of a District Municipality—Bombay District Municipal Act (Bom. Act III of* 1901)—*Penal Code (Act XLV of* 1860), *secs.* 21, 186.

See PENAL CODE 213

QUARRY—"*Market value of land*"—*Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bom. Act IV of* 1898)—*Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references—Land Acquisition Act (I of* 1894), *sec.* 23.

See LAND ACQUISITION ACT 483

RAILWAYS ACT (IX OF 1890), SEC. 75, SCH. II, CL. (*l*)—*Parcel containing articles liable to be insured and also not liable to be insured—Loss of the parcel in transit on Railway line—Suit against Railway Company to recover damages with respect to goods not liable to be insured—Railway Company not liable—Articles—Package.*] Plaintiff's agent at Poona consigned a parcel to plaintiff at Dhárwár. The parcel contained goods which, according to section 75 and Schedule II of the Indian Railways Act (IX of 1890), were liable to be insured as well as those not so liable. The parcel was lost in transit on the Southern Marátha Railway Line. The plaintiff thereupon sued the Railway Company to recover damages for the loss of the goods which were not liable to be insured. The defendant Company denied liability.

Held that the Railway Company was not liable. The words of section 75 of the Railways Act (IX of 1890) draw a distinction between articles mentioned in Schedule II of the Act and the parcel or package in which they are contained and provides that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package.

PUNDALIK *v.* S. M. RAILWAY COMPANY ... ... (1909) 33 Bom. 703

RECEIVER—*Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge—Appeal—Civil Procedure Code (Act XIV of* 1882), *secs.* 503, 505 *and* 588.

See CIVIL PROCEDURE CODE 104

REDEMPTION SUIT—*Sale really a mortgage—Sec.* 10*A of the Dekkhan Agriculturists' Relief Act (XVII of* 1879) *not applicable—Oral evidence inadmissible—Application for withdrawal of suit—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity—Civil Procedure Code (Act XIV of* 1882), *secs.* 373 *and* 622—*Dekkhan Agriculturists' Relief Act (XVII of* 1879).

See DEKKHAN AGRICULTURISTS' RELIEF ACT 722

REGISTRATION—*Lease unregistered when admissible in evidence—Conduct of parties to lease—*"*Collateral purpose*"—*Transfer of Property Act (IV of* 1882), *sec.* 107—*Lien—Charge—Assignment.*

See LEASE 610

RELEASE—*Relinquishment of claim by reversioner—Stamp.*

See STAMP 657

RELEASE BY COPARCENER—*Right of coparcener's afterborn son to claim a share with his brothers—Joint Hindu family—Hindu law.*

See HINDU LAW 267

RELIGIOUS PRIVILEGES—*Shankaracharya of Sharada Math, plaintiff—Shankaracharya of Dholka, defendant—Dispute as to precedence or privilege*

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between purely religious functionaries—Jurisdiction of Civil Courts—Civil Procedure Code (Act XIV of 1882), sec. 11.

See CIVIL PROCEDURE CODE 278

RELINQUISHMENT OF CLAIM—*Reversioner—Release—Stamp.*] The relinquishment of his claim by a reversioner is a release and must be stamped accordingly.

KRISHNAJI NARAYAN *v.* BALKRISHNA VENKATESH ... (1909) 33 Bom. 657

RENT—*Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary—Transfer of Property Act (IV of 1882), sec. 50.*

See TRANSFER OF PROPERTY ACT 96

RES JUDICATA—Civil Procedure Code (Act XIV of 1882), sec. 13—Plea of res judicata can prevail even where its effect is to sanction what is illegal—Bhágdári and Narwádári Tenures Act (Bom. Act V of 1862), sec. 3.] A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute.

CHHAGANLAL *v.* BAI HARKHA ... ... (1909) 33 Bom. 479

RESIDENT'S COURT—*Application to state a case to the High Court—Application unconditional before delivery of judgment—Presidency Small Cause Courts Act (XV of 1882), sec. 69—Aden Courts Act (II of 1864), secs. 8 and 9.*

See ADEN COURTS ACT... 708

REVERSIONER—*Relinquishment of claim by—Release—Stamp.*

See STAMP 657

SALE BY COURT—*Decree—Execution—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under sec. 310A when they also fall under sec. 244, Civil Procedure Code, 1882—Civil Procedure Code (Act XIV of 1882), secs. 244, 310A, 311.*

See CIVIL PROCEDURE CODE 698

SALT ACT (BOM. ACT II OF 1890), SECS. 11 AND 47—*Salt pans—Lease under a license from Collector—Lessee not to sublet without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie.*] Y. obtained from Government a lease of certain salt pans to manufacture salt under a license. One of the conditions of the lease was that the lessee should not sublet the salt pans without the written permission of the Collector. Without any such permission, however, Y. sublet the pans to R. who, as a security for the performance of the conditions of the sub-lease, deposited a sum of Rs. 1,000 with Y. The sub-lease was acted upon and on the expiration of its term R. brought a suit for the recovery of the deposit from the representative of Y., the latter denied R.'s right to recover the deposit on the ground that it formed a consideration for an agreement which, having been forbidden by law, was illegal.

Held, dismissing the suit, that the defendant's plea should prevail. The real object and the necessary effect of the sub-lease was to enable the plaintiff to manufacture salt without a license in the guise of a sub-lease although that was forbidden by law and by the terms of the license.

ISMALJI YUSUFALLI *v.* RAGHUNATH LACHIRAM ... (1909) 33 Bom. 636

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SEA CUSTOMS ACT (VIII OF 1878), SEC. 19—*Cocaine—Import by sea into the Bombay Harbour—"Import," meaning of—Bombay Abkári Act (Bom. Act V of 1878), secs.* 3 (10), 9, 43.

See BOMBAY ABKARI ACT 380

SECURITY—*Order to furnish security—Order can be passed by the appeal Court—Jurisdiction of the appeal Court—Criminal Procedure Code (Act V of* 1898), *sec.* 106 (3).

See CRIMINAL PROCEDURE CODE 33

SEDITION—*Publication, what constitutes—Promoting enmity, &c., between classes—Indian Penal Code (Act XLV of* 1860), *secs.* 124*A*, 153*A—Charges—Joinder of charges—Misjoinder of charges—Criminal Procedure Code (Act V of* 1898), *secs.* 225, 233, 234, 235, 236 *and* 237.

See CRIMINAL PROCEDURE CODE 77

SHUDRA—*Sub-divisions of Shudra tribe—Panchals—Kurbars—Inter-marriage valid—Custom as to illegality—Burden of proof—Hindu law.*

See HINDU LAW 693

SMALL CAUSES COURT SUIT—*Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes Court—Jurisdiction.*

See JURISDICTION 469

SMALL CAUSE SUIT—*Suit brought in the Court of First Class Subordinate Judge having small cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge who had no small cause powers—Registering the suit as a regular suit—Trial of the suit by the First Class Subordinate Judge as a regular suit—Suit remains a small cause.*] A suit of the nature of a small cause was instituted in the Court of the First Class Subordinate Judge who had small cause powers. At the date of its institution, he was on privilege leave and his Court was in the charge of the Joint Second Class Subordinate Judge who had no small cause powers. The suit was therefore registered as a regular suit. On his return from leave the First Class Subordinate Judge tried it as a regular suit. The question having arisen whether the suit was a small cause,

Held, that the First Class Subordinate Judge continued to be a Judge with Small Cause Court powers during his absence on leave, and the entering of the suit in the file of regular suits could not take it away from the category of small causes nor could the fact that the Subordinate Judge tried the suit under his ordinary jurisdiction deprive it of its character as a small cause.

NARAYAN RAVJI *v.* GANGARAM RATANCHAND ... (1909) 33 Bom. 664

STAMP—*Relinquishment of claim by reversioner—Release.*] The relinquishment of his claim by a reversioner is a release and must be stamped accordingly.

KRISHNAJI NARAYAN *v.* BALKRISHNA VENKATESH ... (1909) 33 Bom. 657

STAMP ACT (II OF 1899), SEC. 2 (5) (*b*)—*Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document.*] The transactions comprised in a document consisted of a transfer of a mortgage secured on a cotton mill and an agreement that the transferee should lend money at the request of the transferor to the mortgaged mill for making improvements, additions and repairs and for the working of the mill.

A question having arisen as to what was the proper stamp duty payable on the document.

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Held, that the document was only liable to stamp duty as a transfer of mortgage and as an agreement, that is, to Rs. 5-8-0 in all.

An agreement to lend money does not create an obligation to pay money within clause (5) (*b*) of section 2 of the Indian Stamp Act (II of 1899).

An agreement to lend money to a partnership is not capable of specific performance and it creates no debt although the breach of it may give rise to a claim for damages.

HITWARDHAK COTTON MILLS CO. *v.* SORABJI ... (1909) 32 Bom. 426

STATUTE OF FRAUDS (29 CH. II, C. 3), SEC. 7—*Indian Trusts Act (II of 1882), secs. 1 and 2—The Trustees and Mortgagees Powers Act (XXVIII of 1866), sec. 34—Non-applicability to Charitable Trusts.*

See CHARITABLE TRUSTS 509

STAY OF PROCEEDINGS—*Contempt of Court—Notice of motion for committal—Service of notice—Personal service necessary—Service upon attorneys not sufficient—Appeal pending from order.*] When proceedings are taken for committal of a person for contempt of a Court's order, the Court is not obliged to stay those proceedings merely because an appeal has been filed from such order.

Gordon v. *Gordon* [1904] P. 163, followed.

BAI MOOLBAI *v.* CHUNILAL PITAMBER ... ... (1909) 33 Bom. 630

STRIDHAN—*Succession—Competition between husband and step-son—Mitakshara—Hindu law.*

See HINDU LAW 452

SUCCESSION—*Hindu law—Mitakshara—Adopted son—Adoptive mother entitled to succeed in preference to adoptive father.*] Under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed in preference to the adoptive father, to a son taken in adoption.

ANANDI *v.* HARI SUBA ... ... (1909) 33 Bom. 404

———————*Stridhan—Competition between husband and step-son—Mitakshara—Hindu law.*

See HINDU LAW 452

SUIT, PREMATURE—*Hindu widow—Maintenance—Widow having her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance.*

See MAINTENANCE 50

SUITS VALUATION ACT (VII OF 1887), SEC. 8—*Suit for declaration and consequential relief—Valuation—Court-fees—Jurisdiction—Value of the relief stated in the plaint.*] In a suit for declaration and consequential relief (injunction) with respect to land the Court must accept the value of the relief stated in the plaint for the purpose both of the Court-fees and jurisdiction.

Hari Sanker Dutt v. *Kali Kumar Patra* (1905) 32 Cal. 734, followed.

Dayaram v. *Gordhandas* (1906) 31 Bom. 73, distinguished.

VACHHANI *v.* VACHHANI ... ... (1908) 33 Bom. 307

———————*Suit for partition and separate possession of joint family property—Valuation for Court-fee purposes—Market value of subject-matter determines jurisdiction—Jurisdiction—Court Fees Act (VII of 1870), sec. 7, cl. (iv) (b), sec. 7, cl. (v).*

See COURT FEES ACT 658

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SUMMARY TRIAL—*Workman's Breach of Contract Act* (*XIII of* 1859)—*Inquiry under the Act—Summary trial not permissible.*] An offence under the Workman's Breach of Contract Act, 1859, cannot be tried summarily.

Emperor v. *Dhondu Krishna* (1904) 33 Bom. 22, followed.

EMPEROR *v.* BALU ... ... (1908) 33 Bom. 25

———————*—Workman's Breach of Contract Act* (*XIII of* 1859), *secs.* 1, 2 *—Court Fees Act* (*VII of* 1870), *sec.* 31—*Court-fee on petition of complaint—Liability of workman to pay.*

See WORKMAN'S BREACH OF CONTRACT ACT 22

SURVEYORS' OPINIONS—*Objections to surveyors' reports—Land Acquisition Act* (*I of* 1894), *sec.* 18—*Compensation—Mode of valuation when no recent sales —Market value.*] *Held*, that in addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary, however, to distinguish opinion from argument.

The practice which has grown up in reference under the Land Acquisition Act, 1894, of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection. A surveyor's opinion by itself is good evidence.

IN THE MATTER OF KARIM TAR MAHOMED ... ... (1903) 33 Bom. 325

TAXATION—*Pleader's fees—Appeals in Probate Proceedings—Scale of costs—Act I of* 1846, *sec.* 7—*Practice.*

See PRACTICE 256

TAXATION OF COSTS—*Petition—Taxing Master—High Court Rules, Rule* 544—*Solicitors' retainer denied.*

See ATTORNEY'S COSTS 667

TAXING MASTER—*Petition—High Court Rules, Rule* 544—*Solicitors' retainer denied—Taxation of costs.*

See ATTORNEY'S COSTS 667

TEMPLE, TRUSTEES OF—*Suit by temple committee against temple servants for declaration as to their right to have the services performed—Suit of a civil nature—Civil Court—Jurisdiction—Civil Procedure Code* (*Act V of* 1908), *sec.* 9.

See CIVIL PROCEDURE CODE 387

TEXTS, CONSTRUCTION OF—*Hindu law—Marriage—Asura form—Brahma form.*] It is a principle enunciated by Vijnaneshvara that where all *smritis* are of equal importance and where there is a conflict between two or more writers, the Court is free to choose any it likes.

CHUNILAL *v.* SURAJRAM ... ... (1909) 33 Bom. 433

TIPNIS PANSARE RIGHT—*Right to levy toll on exports of paddy from foreign territory—Such a right is nibandha under Hindu law—The right is immoveable property—Suit to enforce the right in British Courts—Jurisdiction.*

See JURISDICTION 373

TITLE—*Appointment of a committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by committee against a trespasser in ejectment.*

See EJECTMENT 499

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TITLE—*Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession.*

See OWNERSHIP 712

TITLE-DEEDS, DEPOSIT OF—*Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.*

See MORTGAGOR AND MORTGAGEE 1

TODA GIRAS ALLOWANCE ACT (BOM. ACT VII OF 1887), SEC. 5—*Toda Giras allowance—Attachment and sale of in execution of a decree—"Money likely to become due," interpretation of—How far can the allowance be attached and sold.*] The plaintiff, who held a money-decree against the defendant, applied for its execution by sale of the *toda giras* allowance which the latter was entitled to receive periodically from the Mámlatdár's Kacheri. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the defendant during the twenty years following the application. The lower Courts held that the defendant's life interest in the *toda giras* allowance computed at its valuation for twenty years, could be attached and sold in execution of the decree.

Held, reversing the order, that it is clear from the language of section 5 of the Toda Giras Allowance Act (Bombay Act VII of 1887) that it is not the life interest of the judgment-debtor in a *toda giras* allowance, but something short of it that is allowed by the Act to be attached.

The words "money likely to become due" in section 5 of the Act must be restricted to the case where, for instance, during the life-time of the judgment-debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment-debtor dies before that date; and to other cases of a similar character.

Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises.

AMARSANG *v.* JETHALAL ... ... (1909) 32 Bom. 258

TRANSFER—*Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document—Stamp Act (II of 1899), sec. 2 (5) (b).*

See STAMP ACT 426

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 50—*Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.*] On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person

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entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same.

Held, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary.

KAVERIAMMA *v.* LINGAPPA ... ... (1908) 33 Bom. 96

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 55, CL. (4) (*b*), CL. (6)—*Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Estoppel—Evidence Act (I of* 1872), *sec.* 115.] In a registered sale-deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property.

Held, that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title-deeds.

Per BATCHELOR, J.:—A vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser.

TEHILRAM *v.* KASHIBAI ... ... (1908) 33 Bom. 53

SEC. 59—*Dekkhan Agriculturists' Relief Act* (*XVII of* 1879), *sec.* 63 (*A*)—*Mortgage-deed—Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him.*] A deed of mortgage was signed by the Sub-Registrar who was bound to attest it under the provisions of section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and the writer of the deed in concluding the writing of the body of the document stated that it was written by him. The deed was not attested by two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882).

Held, that neither the signature of the Sub-Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage.

An attesting witness is a "witness who has seen the deed executed and who signs it as a witness."

Burdett v. *Spilsbury* (1843) 10 C. & F. 340, followed.

RANU *v.* LAXMANRAO ... ... (1908) 33 Bom. 44

SEC. 93—*Decree—Execution—Civil Procedure Code* (*Act XIV of* 1882), *sec.* 244.

See DECREE 273

SEC. 107—*Lien—Charge—Assignment—Lease unregistered when admissible in evidence—Conduct of parties to lease*

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—"*Collateral purpose.*"] Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (*i. e.*, a lease) conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel.

ARDESIR BEJONJI *v.* SYED SIRDAR ALI KHAN ... (1908) 33 Bom. 610

TRESPASSER—*Appointment of a committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by committee against a trespasser in ejectment—Title.*

See EJECTMENT 499

TRIAL—*Trial by Jury—Trial with the aid of assessors—Difference in the modes of trial—Accused if prejudiced can complain—Practice—Procedure—Criminal Procedure Code* (*Act V of* 1898), *sec.* 269.

See CRIMINAL PROCEDURE CODE 423

TRUSTEE—*Executor—Advice of Court as to administration of property—Executor continuing as such—Administration suit—Trusts Act* (*II of* 1882), *sec.* 34.

See TRUSTS ACT 429

TRUSTEES AND MORTGAGEES POWERS ACT (XXVIII OF 1866), SEC. 34—*Non-applicability to Charitable Trusts—Indian Trusts Act* (*II of* 1882), *secs.* 1 *and* 2—*Statute of Frauds* (29 *Ch. II, C.* 3), *sec.* 7.] The Trustees and Mortgagees Powers Act (XXVIII of 1866) doest not apply to Charitable Trusts. Section 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst other sections section 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events section 34 has ceased to have any force. The saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity. Section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act. Section 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time; even if it did, the Indian Evidence Act entirely superseded it.

SIR DINSHA MANEKJI PETIT *v.* SIR JAMSETJI JIJIBHAI ... (1908) 33 Bom. 509

TRUSTEES OF TEMPLE—*Suit by temple committee against temple servants for declaration as to their right to have the services performed—Suit of a civil nature—Civil Court—Jurisdiction—Civil Procedure Code* (*Act V of* 1908), *sec.* 9.

See CIVIL PROCEDURE CODE 387

TRUSTS ACT (II OF 1882), SECS. 1 AND 2—*Trustees and Mortgagees Powers Act* (*XXVIII of* 1866), *sec.* 34—*Non-applicability to Charitable Trusts—Statute of Frauds* (29 *Ch. II, C.* 3), *sec.* 7.] The Trustees and Mortgagees Powers Act (XXVIII of 1866) does not apply to Charitable Trusts. Section 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst other sections section 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events section 34 has ceased to have any force. The saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of

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TRUSTS ACT (II OF 1882), SEC. 34—*Executor—Trustee—Advice of Court as to administration of property—Executor continuing as such—Administration suit.*] So long as an executor occupies that position, he cannot claim the advantages provided for trustees by section 34 of the Indian Trusts Act (II of 1882). If he feels any doubt as to the manner in which he should administer the estate come to his hands, his remedy is to file an administration suit.

TRIMBAK MAHADEV *v.* NARAYAN HARI ... ... (1909) 33 Bom. 429

——————SEC. 84—*Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two—Contract Act (IX of 1872), secs. 2 (g), (h), 20—35, 65.*

See CONTRACT ACT 411

TRUSTS TO PERFORM MUKTAD CEREMONIES—*Nature and meaning of Muktad ceremonies—Ceremonies tending towards the advancement of religion—Tenets of Zoroastrian faith—Practice—How far decision by single Judge binding on his successors.*

See MUKTAD CEREMONIES 122

VALUATION—*Mode of valuation when no recent sales—Market value—Surveyors' opinions—Objections to surveyors' reports—Determination of value of frontage land—Building frontage, how determined—Relative value of back land and frontage—Hypothetical building scheme, value of—Value of whole land, how derived from value of part—Collector's award—Land Acquisition Act (I of 1894), sec. 18.*

See LAND ACQUISITION ACT 325

——————*Suits Valuation Act (IX of 1887), sec. 8—Suits for partition and separate possession of joint family property.—Valuation for court fee purposes—Market value of subject-matter determines jurisdiction—Jurisdiction—Court Fees Act (VII of 1870), sec. 7, cl. (iv) (b) and cl. (v).*

See COURT-FEES ACT 658

WIDOW—*Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation—Hindu law.*

See HINDU LAW 88

——————*Gift of a son by first husband in adoption by widow after her remarriage—Hindu Widow Remarriage Act (XV of 1856), secs. 2, 3, 4 and 5.*

See ADOPTION 107

——————*Maintenance—Widow having her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Premature suit.*] The plaintiff, a Hindu widow, filed a suit to recover arrears of maintenance and to obtain a declaration of her right to maintenance. At the time the suit was brought, she was found to be in possession of a fund belonging to her husband's family estate, which sum was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court.

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Held, that no cause of action had accrued to the plaintiff. At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later.

DATTATRAYA WAMAN *v.* RUKHMABAI ... ... (1908) 33 Bom. 50

WILL—*Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title-deeds previously with mortgagees—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.*

See MORTGAGOR AND MORTGAGEE 1

WITHDRAWAL OF SUIT—*Redemption suit—Sale really a mortgage—Sec.* 10*A of the Dekkhan Agriculturists' Relief Act* (*XVII of* 1879) *not applicable—Oral evidence inadmissible—Suit allowed to be withdrawn with liberty to bring a fresh suit—Material irregularity—Civil Procedure Code* (*Act XIV of* 1882), *secs.* 373 *and* 622—*Dekkhan Agriculturists' Relief Act* (*XVII of* 1879).

See CIVIL PROCEDURE CODE 722

WITNESS—*Defendant summoned for examination—Payment of batta—Dekkhan Agriculturists' Relief Act* (*XVII of* 1879). *sec.* 7.

See DEKKHAN AGRICULTURISTS' RELIEF ACT 249

WORDS AND PHRASES:—

——————————"Adjustment of suit," what is.

See CIVIL PROCEDURE CODE 69

——————————"Agriculturist," meaning of.

See DEKKHAN AGRICULTURISTS' RELIEF ACT 376

——————————"Appear," meaning of.

See BOMBAY MUNICIPAL ACT 334

——————————"Articles".

See RAILWAYS ACT 703

——————————"Danger," meaning of.

See BOMBAY MUNICIPAL ACT 334

——————————"Earns his livelihood".

See DEKKHAN AGRICULTURISTS' RELIEF ACT 376

——————————"Further or other relief," meaning of.

See CHARITABLE TRUSTS 9

——————————"Immoveable property," meaning of.

See JURISDICTION 373

——————————"Import," meaning of.

See BOMBAY ABKARI ACT 380

——————————"Money likely to become due," interpretation of.

See TODA GIRAS ALLOWANCE ACT 258

——————————"Package".

See RAILWAYS ACT 703

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WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859)—*Inquiry under the Act—Summary trial not permissible.*] An offence under the Workman's Breach of Contract Act, 1859, cannot be tried summarily.

Emperor v. *Dhondu Krishna* (1904) 33 Bom. 22, followed.

EMPEROR *v.* BALU ... ... (1908) 33 Bom. 25

SECS. 1, 2—*Summary inquiry into an offence punishable under the Workman's Breach of Contract Act—Court Fees Act (VII of 1870), sec. 31—Court-fee on petition of complaint—Liability of the workman to pay.*] An offence under the Workman's Breach of Contract Act (XIII of 1859) cannot be tried summarily. A penal enactment must be construed strictly. The proceedings of the Magistrate, under the Act, up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any offence as defined in the Criminal Procedure Code.

In a proceeding under the Workman's Compensation Act where the workman admits the advance and repays the same it is not competent to the Magistrate to make him pay to the complainant the Court-fee paid on the petition of complaint.

EMPEROR *v.* DHONDU ... ... (1904) 33 Bom. 22

WRITTEN SUBMISSION—*Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of* 1882), *sec.* 375—*Adjustment of suit, what is.*

See ADMINISTRATION SUIT 63

ZOROASTRIAN FAITH, TENETS OF—*Trusts to perform Muktad ceremonies, validity of—Nature and meaning of Muktad ceremonies—Ceremonies tending towards the advancement of religion—Practice—How far decision by single Judge binding on his successors.*

See MUKTAD CEREMONIES 122